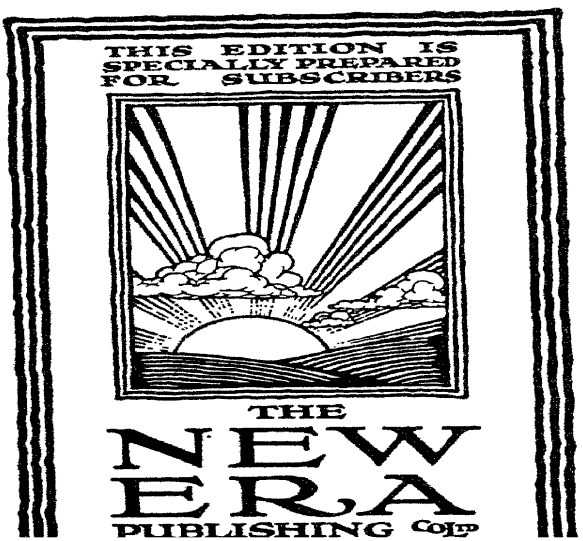
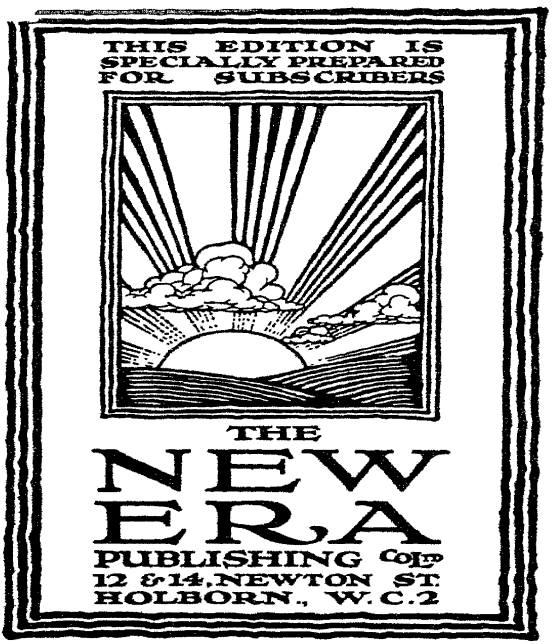
SOLICITORS OFFICE LIBRARY

VOLUME X



SOLICITORS OFFICE LIBRARY

VOLUME X



Edited by

SIR T. CATO WORSFOLD, Bt.

LL.D., M.A., J.P., D.L.

Solicitor of the Supreme Court

VOLUME X

TRUSTS, TRUSTEES, AND TRUST ACCOUNTS

THE NEW ERA PUBLISHING CO., LTD.

12 & 14 NEWTON STREET, HOLBORN, LONDON, W.C.2

TRUSTS, TRUSTEES
AND
TRUST ACCOUNTS

BY
A. H. COSWAY
AUTHOR OF
"THE CONVEYANCER'S NOTEBOOK"
"THE ADMINISTRATION OF ESTATES," ETC.

First Edition . . 1935
Reprinted . . 1936
,, . . 1938

PREFACE

IT is impossible by any statistics to ascertain the number of trusts which exist, but there is no doubt that compared with the position ten years ago the number must have considerably increased—an increase which has largely been brought about by the mass of property law which came into operation on the 1st January, 1926.

In consequence of this there are many persons who are trustees but are unconscious of the fact, and there are many other owners of property, or of shares and interests therein, who are unconscious of the fact that there is a trust existing which affects their property. The abolition of a legal estate in undivided shares in property whereby the number of legal owners was undoubtedly considerably decreased was to some extent counterbalanced by the increase caused by the new law of intestacy under which there may be several owners of real property in cases where under the old law there would have been but one.

The object sought in this book is to explain in simple language the nature of the various trusts which exist, and particularly how the legislation of 1925 has affected the ownership of property, and also to show the powers and duties of trustees over property and to point out the principles which should govern their trust accounts.

A. H. COSWAY

CONTENTS

CHAP.		PAGE
	PREFACE	vii
	TABLE OF CASES	xi
	TABLE OF STATUTES	xv
I.	THE NATURE OF A TRUST	1
II.	THE OFFICE OF TRUSTEE	7

PART I

REAL AND LEASEHOLD PROPERTY

III.	PRELIMINARY OBSERVATIONS	13
IV.	CLASSES OF TRUSTEES	16
V.	TRUSTEES' POSITION WITH REGARD TO LAND	27
VI.	WHO IS A TENANT FOR LIFE? DEVOLUTION OF ESTATE ON DEATH OF TENANT FOR LIFE	33
VII.	POWERS OF MANAGEMENT	43
VIII.	CAPITAL MONEYS UNDER SETTLED LAND ACT	68
IX.	DISCHARGE OF SETTLED LAND TRUSTEES	70
X.	UNDIVIDED SHARES	72
XI.	INFANTS' PROPERTY IN LAND	83
XII.	PROPERTY PASSING UNDER WILLS OR ON INTESTACY AND ASSENTS IN RESPECT THEREOF	88

PART II

PERSONAL PROPERTY AND GENERAL TRUST LAW

CHAP.		PAGE
XIII.	PERSONALTY SETTLEMENTS	95
XIV.	INVESTMENTS ON MORTGAGE	104
XV.	PROTECTIVE TRUSTS	108
XVI.	POWERS OF ADVANCEMENT	111
XVII.	HOTCHPOT	113
XVIII.	MAINTENANCE	115
XIX.	APPOINTMENTS OF NEW TRUSTEES	120
XX.	TRUSTS ON INTESTACY	130
XXI.	POWERS OF APPROPRIATION	135
XXII.	APPOINTMENT OF AGENTS AND DELEGATION OF POWERS	139
XXIII.	GETTING IN TRUST PROPERTY	143
XXIV.	ADVERTISEMENTS FOR CREDITORS	147
XXV.	RETIREMENT OF TRUSTEES, BREACHES OF TRUST AND RELIEF IN RESPECT THEREOF	150
XXVI.	INDEMNITY AND PROTECTIVE CLAUSES	155

PART III

XXVII.	TRUST ACCOUNTS	160

APPENDICES

A.	IMPROVEMENTS AUTHORISED BY SETTLED LAND ACT	205
B.	INVESTMENT OF CAPITAL UNDER SETTLED LAND ACT	208
C.	TRUST INVESTMENTS	211
D.	DISTRIBUTION OF RESIDUARY ESTATE ON INTESTACY	214
E.	MISCELLANEOUS FORMS	216
	INDEX	223

TABLE OF CASES

PAGE

Acklom, *Re* Oakeshott *v.* Hawkins, [1929] 1 Ch. 195 36
Alefounder's Will Trusts, *Re*; Adnams *v.* Alefounder, [1927] 1 Ch. 360 42
Alfreton, *Re*; (1883), 52 L. J. 745 113
Allhusen *v.* Whittell (1867), L.R. 4 Eq. 295 186
Alston-Roberts-West's Settled Estates, *Re*; [1928] W.N. 41 . . 37
Atkinson, *Re*; Webster *v.* Walter, [1930] 1 Ch. 47 174
Attorney-General *v.* Jackson, [1932] W.N. 61 172
Atkinson, *Re*; [1904] 2 Ch., C.A. 160 192
Aucketill's Estate, *Re*; (1881), 27 L.R. Ir. 331 193
Averill, *Re*; Salisbury *v.* Buckle, [1898] 1 Ch. 523 116

Bacon, *Re* (1889); 42 Ch. D. 559 113
Ball, *Re*; Jones *v.* Jones, [1930] W.N. 111 47
Barrat, *Re*; Body *v.* Barrat, [1929] 1 Ch. 336 81
Bates, *Re*; Mountain *v.* Bates, [1928] Ch. 682 170
Beale's Settlement, *Re*; [1931] W.N. 233 47
Beverly, *Re*; Watson *v.* Watson, [1901] 1 Ch. 681 . . . 137
Binns, *Re*; Public Trustee *v.* Ingle, [1929] 1 Ch. 677 . . . 114
Birch, *Re*; [1909] 1 Ch. 787 179
Bird, *Re*; Watson *v.* Nunes, [1927] 1 Ch. 210 . . . 37, 80
Boulter, *Re*; Capital and Counties Bank *v.* Boulter, [1918] 2 Ch. 40 116
Boulton's Settlement Trust, *Re*; Stewart *v.* Boulton, [1928] Ch. 703 110
Bridgett and Hayes' Contract, *Re*; [1928] Ch. 163 39
Brooke *v.* Pearson (1859), 27 Beav. 181 109
Brooker, *Re*; Brooker *v.* Brooker, [1926] W.N. 93 . . . 185
Bulkeley *v.* Stephens, [1896] 2 Ch. 241 198
Buxton, *Re*; Buxton *v.* Buxton, [1930] 1 Ch. 648 181

Calow, *Re*; Calow *v.* Calow, [1928] Ch. 710 181
Carnarvon's (Earl) Chesterfield Settled Estates *Re*; *Re* Carnarvon's (Earl) Highclere Settled Estates, [1927] 1 Ch. 138 . . . 36
Cater's Trusts, *Re*; (1858), 25 Beav. 361 154
Catling, *Re*; Public Trustee *v.* Catling, [1931] W.N. 185 . . 36
Cayley and Evans' Contract, *Re*; [1930] 2 Ch. 143 . . . 31
Chesterfield's Trusts, *Re*; (1883), 24 Ch. D. 643 . . . 184, 188
Clarke, *Re*; *Ex parte* Schultze, [1898] 2 Q.B. 330 177
Clark *v.* Hoskins (1857), 27 L.J. Ch. 561 151
Clayton's Settled Estates, *Re*; [1926] Ch. 279 31
Cliff and English Electric Co.'s Contract, *Re*; [1927] 2 Ch. 94 . . 124
Clowes, *Re*; [1893] 1 Ch. 214 181
Colyer's Farningham Estate, *Re*; [1927] 1 Ch. 677 . . . 81
Conquest, *Re*; Royal Exchange Assurance *v.* Conquest, [1929] 2 Ch. 353 63
Cook, *Ex parte* (1803), 8 Ves. 353 109
Cox *v.* Cox (1869), L.R. 8 Eq. 343 192

PAGE
Cradock's Settled Estates, *Re*; [1926] Ch. 944 31
Craven, *Re*; [1914] 1 Ch. 358 190
Cruse, *Re*; Gass *v.* Ingham. [1930] W.N. 206 174
Cugny's Will Trusts, *Re*; Smith *v.* Freeman, [1931] 1 Ch. 305 . . 90
Curwen *Re*; Curwen *v.* Graham, [1931] 2 Ch. 341 31

Darlington *v.* Darlington, [1926] W.N. 192 124
Dawson *v.* Inland Revenue Commissioners (1905), 2 I.R. 69. . 137
Dickson, *Re*; Hill *v.* Grant (1885), 29 Ch. D. 331 116

Eyre, *Re*; [1917] 1 Ch. 351 116

Fegan, *Re*; Fegan *v.* Fegan, [1928] Ch. 45 179
Forster Brown, *Re*; [1914] 2 Ch. 564 190
Frewen, *Re*; [1926] Ch. 580 37

Gaul and Houlston's Contract, *Re*; [1928] Ch. 689 . . . 80
Gray, *Re*; Public Trustee *v.* Woodhouse, [1927] 1 Ch. 242 . . 61

Hanson, *Re*; Hanson *v.* Eastwood, [1928] Ch. 96 36
Hargreaves, *Re* (1903). 88 L.T. 100 190
Head *v.* Gould, [1898] 2 Ch. 250 151
Hewitt *v.* Jardine (1872), 14 Eq. 1467 114
Higginbotham *v.* Holme (1811), 19 Ves. 88 109
Holford, *Re*; [1894] 3 Ch. 30 116
Hotchkys, *Re*; Freke *v.* Calmady (1886), 32 Ch. D. 408 . . 62, 63
Howe *v.* Dartmouth (Earl) Howe *v.* Aylesbury (Countess) (1802), 7 Ves. 137 183–185

Jacques Settled Estates, *Re*; [1930] 2 Ch. 418 60
Jones, *Re* (1884), 26 Ch. D. 736 36

Kempthorne, *Re*; Charles *v.* Kempthorne, [1930] 1 Ch. 268 77, 174, 181

Lamb, *Re*; Vipond *v.* Lamb, [1929] 1 Ch. 722 173
Littlewood, *Re*; Clark *v.* Littlewood. [1931] 1 Ch. 443 . . 174, 179
Llanover Settled Estates, *Re*; [1926] Ch. 626 37
Lockhart *v.* Reilly (1857), 1 De G. & J. 476 104

Maber, *Re*; Ward *v.* Maber, [1928] Ch. 88 118
McKee, *Re*; Public Trustee *v.* McKee, [1931] 2 Ch. 145 . . 132
McEuen *In Re*; McEuen *v.* Phelps (1914), 83 L.J. Ch. 66 . . 187
Mansel, *Re*; Smith *v.* Mansel, [1930] 1 Ch. 352 190
Massingberd, *Re*; Clark *v.* Trelawney (1890), 63 L.T. 296 . . 104
Mellish, *Re*; Clark *v.* Buchanan (1927), 164 L.T.J. 23 . . . 181
Morris *v.* Wright (1852), 14 Beav. 38 104
Munton, *Re*: Munton *v.* West, [1927] 1 Ch. 262 156
Myhill, *Re*; Hull *v.* Myhill, [1928] 1 Ch. 100 81

Newman, *Re*; Slater *v.* Newman, [1930] 2 Ch. 409 . . . 182
Nicholson *v.* Field, [1893] 2 Ch. 511 129

O'Grady *v.* Wilmot, [1916] 2 A.C. 231 201
Oldham *v.* Myles, [1927] W.N. 113 187

PAGE
Palairet *v.* Carew (1863), 32 Beav. 568 151
Perkins, *Re*; [1912] W.N. 99 109
Petty, *Re*; Holliday *v.* Petty, [1929] 1 Ch. 726 174
Phillips, *Re*; Lawrence *v.* Huxtable, [1931] 1 Ch. 347 . . . 175
Poyser, *Re*; [1908] 1 Ch. 828 190
Price, *Re*; [1928] Ch. 579 77
Price, *Re*; Price *v.* Price, [1929] 2 Ch. 400 81

Raine, *Re*: Tyerman *v.* Stansfield, [1929] 1 Ch. 716 . . . 118
Rees, *Re*; Rees *v.* George (1881), 17 Ch. D. 701 190
Reeves, *Re*; Reeves *v.* Pawson, [1928] Ch. 351 181
Robins, *Re*; Holland *v.* Gillam, [1928] Ch. 721 62
Rose *v.* Rogers (1870), 39 L.J. Ch. 791 114
Ryder and Steadman's Contract, *Re*; [1927] 2 Ch. 62 . . . 79

Saunders, *Re*; Public Trustee *v.* Saunders, [1929] 1 Ch. 674 . . 131
Saxton *v.* Saxton (1879), 13 Ch. D. 359 180
Scott, *Re*; [1903] 1 Ch. 1 114
Sikes, *Re*; Moxon *v.* Crossley, [1927] 1 Ch. 364 181
Smith, *Re*; Franklin *v.* Smith, [1928] Ch. 10 109
Smith, *Re*; Vincent *v.* Smith, [1930] 1 Ch. 88 64
Stamford and Warrington (Earl), *Re*; Payne *v.* Grey, [1927] 2 Ch. 217 38
Stevens, *Re*; [1915] 1 Ch. 429 116
Stimpson's Trusts, *Re*; Stimpson *v.* Stimpson, [1931] 2 Ch. 77 . 112
Stokes *v.* Prance, [1898] 1 Ch. 212 104

Taylor, In the Estate of, [1929] P. 260 40
Taylor, *Re*; Pullan *v.* Taylor, [1931] 2 Ch. 242 87
Taylor, *Re*; Walters *v.* Taylor, [1926] Ch. 923 170
Tod, *Re*; [1916] 1 Ch. 567 190
Tollemache, *Re*; Forbes *v.* Public Trustee, [1930] W.N. 138 . . 191
Tong, *Re*; Hilton *v.* Bradbury, [1930] 2 Ch. 400 174
Trimble, *Re*; Wilson *v.* Turton, [1931] 1 Ch. 369 203
Trollope's Will Trusts, *Re*; Public Trustee *v.* Trollope, [1927] 1 Ch. 596 186

Vickery, *Re*; Vickery *v.* Stephens, [1931] 1 Ch. 572 . . . 141

Waleran (Baron) Settled Estates, *Re*; [1927] 1 Ch. 522 . . . 36
Watson, *Re*, Brand *v.* Culme-Seymour, [1928] W.N. 309 . . 164
Webb *v.* Jonas (1888), 39 Ch. D. 660 104
Webster *v.* Le Hunt (1861), 9 W.R. 918 151
Wheeler, *Re*; Jameson *v.* Cotter, [1929] 2 K.B. 81. . . . 182
Whitaker, *Re*; Rooke *v.* Whitaker, [1929] 1 Ch. 662 . . . 63
White's Settlement, *Re*; Pitman *v.* White, [1930] 1 Ch. 179 . . 25
Williams, *Re*; Richards *v.* Williams, [1930] 2 Ch. 283 . . . 175
Worthington, *Re*; Nichols *v.* Hart, [1933] W.W. 131 . . . 175

Yerburgh, *Re*; Yerburgh *v.* Yerburgh, [1928] W.N. 208 . 89, 125

STATUTES CITED

PAGE

1 Vict. c. 26 (Wills Act, 1837)
s. 24 180
33 and 34 Vict. c. 35 (Apportionment Act, 1870) . . . 194–198
44 and 45 Vict. c. 41 (Conveyancing Act, 1881)
s. 43 115
6 Edw. VII, c. 55 (Public Trustee Act, 1906)
s. 4 45
15 Geo. V, c. 18 (Settled Land Act, 1925)
s. 1 . . . . . 17, 18, 19, 22
s. 3 71
s. 7 41
s. 13 . . . . . 31, 42
s. 19 33
s. 20 . . . . . 22, 33, 34, 37
s. 23 35
s. 30 . . . . . 16, 23, 24
s. 41 52
s. 44 53
s. 45 54
s. 47 54
s. 48 53
s. 58 144
s. 65 50
s. 66 56
s. 71 52
s. 73 . . . . . 106, 208
s. 83 205
s. 97 157
s. 98 158
s. 99 159
s. 102 . . . . . 61, 84
Second Schedule 123
Third Schedule 64
c. 19 (Trustee Act, 1925)
s. 1 211
s. 2 211
s. 3 96
s. 4 96
s. 5 104
s. 7 98
s. 9 106
s. 10 106
s. 11 98
s. 16 51
s. 17 52

PAGE

15 Geo. V, c. 19 (Trustee Act, 1925)—*(contd.)*
s. 18 126
s. 19 56
s. 20 56
s. 21 155
s. 22 . . . . . 143, 165
s. 23 . . . . . 139, 141
s. 25 141
s. 26 156
s. 27 147
s. 30 . . . . . 10, 140, 141, 155
s. 31 . . . . . 115, 116, 119
s. 32 111
s. 33 108
ss. 34 to 40 120
s. 36 . . . . . 121, 124, 128
s. 40 120
s. 61 151
s. 62 151
s. 63 148
s. 65 120
c. 20 (Law of Property Act, 1925)
s. 1 83
s. 25 25
s. 28 . . . . . 46, 48, 60, 61, 62, 185
s. 29 57
s. 30 47
s. 34 81
s. 35 75
s. 42 23
s. 130 51
s. 158 101
s. 165 118
s. 175 119
s. 205 26
First Schedule (Part II) 30
,, ,, (Part III) . . . 123, 126
,, ,, (Part IV) . . . 79, 126
c. 23 (Administration of Estates Act, 1925)
s. 22 40
s. 26 145
s. 33 . . . . . 89, 142, 184
s. 34 . . . . . 172, 173
s. 35 178
s. 36 . . . . . 89, 91
s. 39 . . . . . 90, 185
s. 41 . . . . . 135, 137
s. 42 124
s. 47 113
s. 48 132–134
s. 49 114

PAGE
15 Geo. V, c. 23 (Administration of Estates Act, 1925)—(*contd.*)
s. 51 86
First Schedule 172
16 & 17 Geo. V, c. 11 (Law of Property (Amendment) Act, 1926) 18, 45
s. 1 23
s. 4 80
22 & 23 Geo. V, c. 27 (Law of Property (Entailed Interests) Act, 1932) 77

TRUSTS, TRUSTEES, AND TRUST ACCOUNTS

CHAPTER I

THE NATURE OF A TRUST

A "TRUST" has been defined in legal textbooks as being "the confidence reposed by one man in another when he invested him with the nominal ownership of property to be dealt with in some particular manner or to be held for some particular person or purposes pointed out." To give a simple illustration of a trust, let us suppose that A. is desirous of providing for the benefit of his two nephews, C. and D. To accomplish this purpose he transfers the sum of £5,000 to E. and F. with a trust deed in which the duties of E. and F. are set out, which may be to apply the interest on the £5,000 for the education and benefit of C. and D., and to pay over the capital sum to them in equal shares when they attain the age of 21 years. In this case, A. would be termed the "settlor," C. and D. would be termed the "beneficiaries," and E. and F. would be termed "the trustees."

If this sum was invested by the trustees in, say, Consols, their names would be inscribed in the books of the Bank of England and as between the Bank and themselves, and in the eyes of the world

the trustees would be the "legal" owners of the Consols, whilst the two nephews would be the "equitable owners." This "legal" ownership is thus referred to in *Wharton's Law Lexicon*—

> A trustee is put into possession of the trust property: the common law could not look at him in any other light than as holding for his own benefit, but equity, regarding the purpose for which he was made a trustee, compelled him to perform such purpose to his employers.

Wherever, therefore, we meet with a trust, there is always this dual ownership, the legal ownership, or "legal estate," as it is called, which is vested in the trustees, and the "equitable" or "beneficial" ownership of the beneficiary. It is further to be noticed that the legal ownership may also be vested in a trustee who may himself have a beneficial interest in part of the trust property, and further that the equitable interest is not necessarily also a beneficial interest. For instance, a trustee might become entitled to a share of the trust property under the will or intestacy of one of the beneficiaries or, as we shall see when we consider the law affecting "undivided shares," he may have been by law constituted a trustee of the legal estate. On the other hand, a beneficiary may have executed a settlement on his marriage or died leaving a will, or intestate, before his share of the property had been handed over to him. In such a case, the trustees of the marriage settlement, or the executors or administrators (as the case might be) of such beneficiary would be the "equitable owners" of such share and the trustees

holding the "legal" estate would then have to hand over the share when the proper time for distribution arrived to such equitable owners, leaving them in their turn to distribute the same amongst the ultimate beneficiaries.

There are other species of trusts which must be referred to, as the student or clerk will doubtless from time to time meet with the expressions. Trusts may be either "express" or "implied." We have already had an illustration of an "express" trust. Here is a simple illustration of an "implied trust." When a person agrees to sell a property a contract for sale is usually signed. In this case, after the signature of the contract and until the purchase has been completed and the property conveyed to the purchaser, the seller or "vendor" (as he is usually termed) is in law a trustee for the purchaser. There is an "implied" trust that he will hold the property in trust for the purchaser until all the preliminary arrangements have been carried out, and he is ready to hand over the management and possession of the property to the purchaser. Or, to give another illustration, an "implied" trust may arise where property is held by trustees "Upon such trusts as the settlor might hereafter declare." Here, until the trusts have been declared, there would be an implied trust in favour of the settlor. Where, as in this case, the settlor himself receives a benefit from the settlement by implication, it is called a "resulting trust."

Trusts are also referred to as "executory" or "executed." The trustees may have property

vested in them which they have to hold upon such trusts as a person may by deed or will declare. Here it will be observed there is no immediate beneficiary, and the trust cannot be carried into effect until the person or persons who are to benefit have been declared by a subsequent deed or by will. This is called an "executory" trust. The trust indicated at the commencement of this chapter is an "executed" trust, because it is a trust which has been definitely created and is not dependent upon the execution of any further document.

Trustees are said to hold property as "joint tenants"; that is to say, all the trustees collectively are, in the eyes of the law, one owner. Joint tenancy has one peculiar incident, that of survivorship: in a case where there are three or more trustees, on the death of one, the whole property automatically vests in the survivors, and this process is repeated until the last of the trustees dies, when the legal ownership vests in the personal representatives (i.e. the "executors" or "administrators") of such last trustee, and we shall in a later chapter have to consider how the property has then to be dealt with.

We have seen that the legal ownership of the trustees in the trust property is absolute, so that they are able to sell investments standing in their names without the beneficiaries having to take part in the sale. As between themselves and the beneficiaries, it is possible the settlement will contain a provision that the beneficiaries have to be consulted and their consent obtained to a change

of investment, but this is not a matter which would appear between the trustees and a purchaser from them. In the case of a sale of property under a trust for sale (which we shall presently deal with) it may be expressly provided that such a sale must be with the consent of the beneficiaries.

It must, however, be understood that what is mentioned above relates to the sale of a trust investment, and not of the beneficial interest of an equitable owner which might be subject to conditions or restrictions affecting the sale or mortgaging of such interest. Unless any such restriction is placed on such interest, it is at all times possible for a beneficiary to deal with his share and interest in a trust property. This share and interest may not be an absolute one. It will in most cases be a "reversionary" interest, that is, an interest which will come to him on the death of a person enjoying the income for life, or after a certain number of years, or on the happening of some event, but the interest may be either "vested" or "contingent." These terms are probably self-suggestive to many, but to make them quite clear it may be mentioned that a "vested" interest is a certain interest, one which cannot be defeated or fail. For instance, if a sum of £1,000 is held in trust for A., for his life and then for B., B.'s interest in this sum is "vested" or absolute, and must take effect on the death of A., and during A.'s life, B.'s interest would be termed a "vested reversionary interest." If, on the other hand, the £1,000 was settled in trust for A. for life and then

for B. if he should survive A., B.'s interest would be termed a "contingent reversionary interest"; it would depend on the chance of his surviving A. The reversioner can, however, in either case deal with his interest by sale or mortgage, unless the settlement under which the interest is derived legally prohibits any such dealing.

CHAPTER II

THE OFFICE OF TRUSTEE

A TRUSTEE usually signifies his acceptance of a trust by signing the deed under which the trust is created, or, if he is appointed a new trustee of an existing trust, by signing the Deed of Appointment.

There are cases, as will be shown later, where a trusteeship has been automatically placed on persons by the legislature, but such cases will generally be found to be cases in which such person is also beneficially interested in the trust property, and where it will accordingly be to his advantage to be also a trustee.

When a trustee is appointed by a will it is open to him to accept or refuse office. If he be merely appointed an executor (which involves a trusteeship though perhaps of short duration) he can sign a short document of renunciation, or, if he be appointed a trustee, and not also an executor, he may renounce the trusteeship either by a deed in writing or by abstaining from taking any part in the trusteeship, in which case he must take care that none of the funds are transferred into his name.

A trusteeship is an office which should not be lightly undertaken; it may be an office which in some cases may be almost nominal, but on the other hand, it may be a long standing matter involving a good deal of time and trouble. Any

trustee who decides to accept office should from the commencement have a clear knowledge of the nature of the trust, and should after acceptance take a constant and intelligent interest in all matters connected with it. He should have either a full copy of the trust deed or an intelligible epitome of it. If the trust is already in existence, he should also have a full list of the trust property and investments and a copy of the trust accounts to date. A schedule of the trust property and an account of any capital dealings since any prior appointment are usually incorporated in the Deed of Appointment. He should then get an assurance that all the investments are such as are authorised by the trust deed or by law, and if there should be any unauthorised investments he should not consent to their being retained without the express authority in writing of all the beneficiaries unless they have already executed a release or indemnity in respect of the retainer of any such unauthorised investments. The trustee should also see that all papers handed over by his predecessor are carefully examined, as there may be notices of dealings with the trust funds or of some share therein, of which he would be deemed to have knowledge. The notices might be either actual or constructive.

With reference to this question of notice, however, it may be pointed out that a new trustee is not necessarily liable in respect of any notices served on his predecessors in office unless it can be proved that he was negligent in searching amongst any papers handed over. It has been

held that a new trustee is not bound to inquire of an outgoing trustee whether he has received any such notices, nor is a trustee liable if, from forgetfulness, he informs an intending incumbrancer that he has no knowledge of any previous incumbrance.

It is always a prudent course to have all notices placed with the trust papers or attached to the trust instrument, and a note made in the trust account books of the receipt of any such notice. A trustee might also with prudence pass on all inquiries received by him as to incumbrances, etc., to the solicitor acting in the trust to be dealt with by him.

The office of trustee is a purely honorary one, and a trustee is not entitled to profit either directly or indirectly from his trusteeship; indeed so strong a view does the Court take of this that in a case where a trustee, who was a stockbroker's clerk and was paid commission for all work introduced by him to his employers, and where he was instrumental in having a valuation of the trust securities made by his employers, the trustee was held bound to give credit in his trust accounts for the share of commission received by him in respect of the valuation. Therefore, where an intending trustee is a professional or business man, he should take care to see that the deed under which he is appointed, or the original deed under which the trust was constituted, expressly authorises him to make the usual charges for all work done by him in connection with the trust in his professional or business capacity.

A trustee is not expected to incur any out-of-pocket expenses on behalf of the trust, and Section 30 (2) of the Trustee Act, 1925, provides that—

> A trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred by him in or about the execution of the trusts and powers.

A trustee must not utilise the trust money for speculative purposes. Should he do so and make a gain, though it is a breach of trust, all gain must be credited to the trust. On the other hand, if any such speculation results in a loss he must restore the trust fund in full with resulting interest.

Trustees for sale selling under a trust for sale must not either directly or indirectly purchase the trust property or any interest in it; neither must they take a mortgage or lease thereof either from themselves or co-trustees, unless, of course, there is a power to do so in the trust instrument, or the leave of the Court is obtained for the purpose. A trustee who has never accepted the trust but has disclaimed it, would be entitled to purchase, and so would a former trustee after the lapse of some considerable period since he relinquished the trust. There appears to be no definite ruling that a sale cannot be made to the wife of a trustee though such a transaction is not recommended.

The existence of the rule that a trustee should not purchase the trust property arises from the fact that he may possess knowledge of the value of the property which is not available to the general public, and that he might thus be able to take an undue advantage of his fiduciary position.

A trustee may, however, acquire the interest of a beneficiary provided he observes the following conditions: he must give a fair price; he must make a full disclosure to the beneficiary of all the facts within his knowledge relating to the property and the circumstances of the transaction; and it is advisable that the beneficiary should obtain independent advice in respect of the transaction.

Where, therefore, it is likely that a member of a testator's family will wish to purchase any of the property and he is appointed an executor or trustee a clause should be inserted in the will that notwithstanding that he is a trustee he may purchase the property at a price named or at a price fixed by a valuation by an independent surveyor.

Although, as we shall presently see, a tenant-for-life is to some extent a trustee, he is not prohibited from purchasing settled land of which he is such tenant for life, or any part thereof, but on the contrary ample provisions have been made to facilitate dealings between a tenant for life and the trustees of the settlement and for mutual dealings with property held under the settlement and property belonging to the tenant for life in his own right.

The power has been so extended that it is now possible to have a sale, grant, lease, mortgage, charge or other disposition of the settled land or of any right or easement or privilege over the same in favour of the tenant for life. It is also provided that capital money may be advanced to the tenant for life on mortgage, or a purchase may be made

from him of land to be made subject to the settlement, or an exchange made with him of settled land for land of his own.

To effect this it is provided that the trustees shall have all the powers of the tenant for life, and also that these transactions may be effected notwithstanding that the tenant for life may also be a trustee of the settlement. Such a purchase would be effected by means of a subsidiary vesting deed, and in the case of a conveyance to the tenant for life the legal estate being already in him as such, all he would need is a deed discharging from the trust instrument the property taken by him. The effect would be that the property taken by the trustees would then become subject to all the trusts of the settlement, whilst that taken by the tenant for life would be discharged therefrom.

As the duties of a trustee are so varied in respect of real property and personal property it is proposed, having stated generally the nature of trusts, to deal with real or landed property first and then with personal property.

PART I

REAL AND LEASEHOLD PROPERTY

CHAPTER III

PRELIMINARY OBSERVATIONS

THAT colossal mass of legislation which is commonly referred to as "The New Property Law" which came into force on the 1st January, 1926—comprising "The Law of Property Act, 1925," "The Settled Land Act, 1925," "The Trustee Act, 1925," and "The Administration of Estates Act, 1925"—has created a great revolution as regards the dealings by trustees with the land in respect of which they are trustees. Although the avowed object of the Acts was to simplify dealing with property, and although it cannot be denied that the Acts have served some useful purposes, the greatest difficulties in practice have arisen in assimilating the old order with the new. The chief objects were (*a*) to forbid the holding of a legal estate in undivided shares in land, and in all cases where property or land was so held prior to the 1st January, 1926, to invest some person or persons with the trusteeship in respect of the entirety of such property or land so that in the eyes of the law, as in the case of personal property, they should be the nominal owners and capable of dealing with such property; (*b*) to create a position of

trusteeship in respect of all property which was in any way fettered with equitable interests, so that a purchaser might be able to deal with trustees who could give an absolute title to the property free from all equitable charges or interests and themselves deal with the owners of such charges or interests; and (*c*) to prevent infants from holding a legal estate in land.

This could only be accomplished by a great shifting of the legal estates from one person to others, and it is not always easy to understand what has been the result of what are termed the "transitional provisions" of the Acts, and in some cases whether or not such provisions affect property at all.

The result has been that property which was "settled land" under the previous law has now ceased to be so in some cases, and in other cases property which was not settled land has now become settled land. A simple illustration of the latter will show the nature of such transformations. Let us suppose that a testator who died twenty years ago had given all his real property to his son subject to the condition that the son should pay his (the testator's) widow an annuity thereout of, say, £50 a year. Before 1926 the son could have sold this property at any time if the widow would join to release her annuity. Now, if a simple contract was made for the sale of the property, a purchaser would be justified in requiring the transaction to be carried out as on a sale of "settled land." Thus it would be necessary to call on the

executors who proved the will (and who may have even forgotten all about the matter), as they would now be the "settled land trustees," to give the son a "vesting deed" to enable him to sell, and they would also have to receive the purchase money and retain it invested in their own names during the widow's lifetime, pay her annuity out of the income, and pay the balance of such income to the son.

CHAPTER IV

CLASSES OF TRUSTEES

GENERALLY speaking, there are three classes of trustees with separate duties allotted to each class. These three classes may be respectively termed, "Settled Land Trustees," "Trustees for Sale," and merely "Trustees." The first two classes are mainly concerned with real property and leasehold property, whilst the third class is concerned merely with personal property, that is, property which does not consist of houses and land.

1. SETTLED LAND TRUSTEES

There are five definitions of persons who may be settled land trustees set out in Section 30 of the Settled Land Act, 1925, but before we can hope to have a clear idea of the distinction between "settled land trustees" and "trustees for sale" we must understand what is meant by "settled land." In ordinary everyday language, this may be said to mean land which is not a person's own absolute property, but land of which such person is entitled to receive the rent or to have the use and enjoyment during his life, and which is not held by trustees upon trust for sale. That trust for sale, when it exists, must be a trust which can be at once effected, and not one which must be postponed until the death of any person. When,

by a deed or will, land is conveyed or devised upon trust for A., for his life and after his death for his child or children, A. is then termed a "tenant for life," and the land is termed "settled land." Similarly, if the property is conveyed or devised to trustees upon trust to permit A. to reside therein, or, as it is generally expressed in legal language, "to have the use and enjoyment thereof" during his life or until the happening of some specified event, in this case also, because there is no immediate trust for sale imposed or conferred on the trustees, the property is settled land, and the deed or will by which the property is so settled is called "the settlement," and the trustees of such a settlement are the "settled land trustees."

The above is a simple illustration of a settlement, but the full definition is contained in Section 1 of the Settled Land Act, 1925, as follows—

(1) Any deed, will, agreement for a settlement or other agreement, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, after the commencement of this Act, stands for the time being—

(i) limited in trust for any persons by way of succession; or

(ii) limited in trust for any person in possession—

(*a*) for an entailed interest whether or not capable of being barred or defeated;

(*b*) for an estate in fee simple or for a term of years absolute subject to an executory limitation, gift, or disposition over on failure of his issue or in any other event;

(*c*) for a base or determinable fee or any corresponding interest in leasehold land;

(*d*) being an infant, for an estate in fee simple or for a term of years absolute; or

(iii) limited in trust for any person for an estate in fee simple or for a term of years absolute contingently on the happening of any event; or

(iv) limited to or in trust for a married woman of full age in possession for an estate in fee simple or a term of years absolute or any other interest with a restraint on anticipation; or

(v) charged, whether voluntarily or in consideration of marriage or by way of family arrangement, and whether immediately or after an interval, with the payment of any rentcharge for the life of any person, or any less period, or of any capital, annual, or periodical sums for the portions, advancement, maintenance, or otherwise for the benefit of any persons, with or without any term of years for securing or raising the same;

creates or is for the purposes of this Act a settlement, and is in this Act referred to as a settlement or as the settlement, as the case requires.

By the Law of Property (Amendment) Act, 1926, the following addition was made to the above section—

This section does not apply to land held upon trust for sale.

Here it may be convenient to pause for the purpose of explaining some of the technicalities already encountered.

Section 1 of the Settled Land Act speaks of land being "limited." To explain this, we must bear in mind that there are now in a general sense only two legal estates in land, either (*a*) an estate in fee simple absolute, equivalent to absolute ownership, or (*b*) a term of years absolute, which is a leasehold estate. The latter term, however, may consist of any number of years or of a period less than a year.

The owner of either of these legal estates may, however, create other estates or interests out of that owned by him. In the case of leasehold estates it may be that licence is required for the creation of any sub-leasehold interest. It is, of course, always open for the owner of a freehold estate to create any leasehold interest, but he may also wish to create other interests in the property—he may wish to give it to his wife for life, and then to his children, or he may even wish to secure it for future generations so far as the law will permit, and this is what is meant by "limiting" land. It is then said to be "limited for persons in succession."

Section 1 also speaks of "an entailed interest." Prior to 1926, this was termed "an estate tail." It is created by the use of such words as "To my son in tail" or "To my son and the heirs of his body." It is, however, usually followed by a gift of a life interest as "To my son for his life and then for his issue in tail." When we speak of "barring an entail" we do not mean securing it, but just the opposite: we mean "cutting off" or "barring out" the entail. This could be accomplished by the person entitled for life and the person entitled to the entailed estate, on attaining the age of 21, executing a deed for that purpose, or if there is no person entitled to a previous life interest the person entitled to the entailed interest can at any time (after attaining 21) by deed or by will bar the entail and make himself the absolute owner in fee simple. But such an estate can be unbarrable.

For instance, if the gift was to A. for life and to his issue by his wife Mary, and Mary died before any issue was born, the estate could not be barred, but would have to go to the next person appointed by the deed or will, or if there were no further "limitations" the estate after A.'s death would go back to the original settlor or testator—i.e. if the settlor was still living, it would go back to him as his own property, or if the settlor was then dead it would go to his estate.

A "base" fee is an estate created by a person entitled to an entailed interest without the consent of a living tenant for life. The effect of such an estate is that it would be effective only so long as the person who created the estate had issue living. But such person could by a subsequent deed, with the consent of the tenant for life, or after the death of the tenant for life, make his interest an absolute one by what is termed "enlarging a base fee into a fee simple."

A "restraint on anticipation" in the case of a married woman was often created to prevent her making an injudicious dealing with her interest, by mortgage or otherwise. The "restraint" ceases when the marriage comes to an end, but revives on a subsequent marriage. The Court, however, has power to remove the restraint if it is of advantage to the woman to do so.

There is another class of "settlement" which we must notice and which is called "a compound settlement." It will have been seen that the definition of "settlement" in the Settled Land Act

speaks of "an instrument or any number of instruments." The most usual instance of a compound settlement arises out of a family settlement. In the case of such a settlement before 1926, it was usual to have the land included in it conveyed to the use of the husband for his life, and then to the use of the trustees for a term of years to secure an annuity or "jointure rent charge" for the wife in case she survived her husband, and also for providing "portions" for the younger children of the marriage, as the property itself would be settled on the first son and his issue. Thereafter when this son had attained 21 years of age and contemplated marriage the father and son would execute a "disentailing" deed of the land, that is, a deed whereby all persons after the son would be cut off from the provisions of the deed, and the father and son between them become, for the time, the absolute owners. Then a further settlement, or as it was usually termed, a "re-settlement," would be made of the land. By this, it would be provided that the son should receive a yearly sum out of the property during his father's lifetime, and he would also usually be given power to provide for his widow and younger children, and subject to these provisions, the property would be resettled so that the father's life interest would be restored to him, and the terms under the first settlement would be continued. It is possible that the trustees under both settlements would not be the same persons, yet, after the father's death during the widow's lifetime and possibly for the purposes of obtaining payment of the portions

for the younger children under the first settlement, the trustees of that settlement would need to have some control over the property, as the first settlement would not cease to have effect until all payments and trusts provided by it had been completed. But if the son, who would then be tenant for life under the second settlement, wished to sell the property he would have to show his title through *that* settlement.

To secure all interests, therefore, it is arranged that there shall be trustees of the "compound settlement." Unless any persons are specially appointed for this purpose the trustees of the first settlement become such trustees. If there are no trustees of such first settlement then, until any are appointed, the trustees of the second settlement are the trustees of the compound settlement. These trustees of the compound settlement are the trustees who must execute the vesting deed in favour of the tenant for life as they are the only persons who can give a purchaser a valid receipt, or, in legal language, "a good and sufficient discharge" for any purchase money.

The definition of a "settlement" as contained in Section 1 (1) (v) of the Settled Land Act, 1925, and the definition of "a tenant for life" as contained in Section 20 (1) (ix) of the same Act created a serious difficulty to many small houseowners who found that instead of being absolute owners of their property they were in the legal sense mere persons having the powers of a tenant for life, and their property became practically unsaleable. The

difficulty arose in this way: On many large estates it had been the custom for many years to convey small building sites subject to family charges. The estate may have comprised several thousand acres on which there was a rentcharge of perhaps £1,000 charged on the whole estate. This, on a small building site, would have averaged possibly a few pence only, but to save the trouble and expense of getting the rentcharge released on every transaction the small site would be sold subject to the charge, and the purchaser would get an indemnity against the charge. Under the Settled Land Act, 1925, these small building sites became part of a compound settlement, and as a vendor was bound under Section 42 of the Law of Property Act, 1925, to convey the legal estate to a purchaser, this could only have been accomplished by getting a vesting deed from the trustees of the settlement who would then have been entitled to receive the purchase money and account to the vendor. To remedy this, Section 1 of the Law of Property (Amendment) Act, 1926, provided that the owners of property for the time being which had been purchased subject to such a rentcharge should be enabled to create a legal estate and pass on the property in the condition in which it was vested in them. This, however, has to be done with an arrangement with the purchaser under his contract.

This is the definition of "settled land trustees" as given in the Settled Land Act, 1925—

> Section 30 (1) Subject to the provisions of this Act, the following persons are trustees of a settlement for the purposes

of this Act, and are in this Act referred to as the "trustees of the settlement" or "trustees of a settlement" namely—

(i) the persons, if any, who are for the time being under the settlement, trustees with power of sale of the settled land (subject or not to the consent of any person), or with power of consent to or approval of the exercise of such a power of sale, or if there are no such persons; then

(ii) the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for the purposes of the Settled Land Acts, 1882 to 1890, or any of them, or this Act, or if there are no such persons; then

(iii) the persons, if any, who are for the time being under the settlement trustees with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold or otherwise dealt with, or with power of consent to or approval of the exercise of such a power of sale, or, if there are no such persons; then

(iv) the persons, if any, who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the settled land, or with power of consent to or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not, or, if there are no such persons; then

(v) the persons, if any, appointed by deed to be trustees of the settlement by all the persons who at the date of the deed were together able, by virtue of their beneficial interests or by the exercise of an equitable power, to dispose of the settled land in equity for the whole estate the subject of the settlement.

And by subsection (3) of Section 30 it is provided—

Where a settlement is created by will, or a settlement has arisen by the effect of an intestacy, and apart from this subsection there would be no trustees for the purposes of this Act of such settlement, then the personal representatives of the deceased shall, until other trustees are appointed, be by virtue of this Act the trustees of the settlement, but where there is a sole personal representative, not being a

> trust corporation, it shall be obligatory on him to appoint an additional trustee to act with him for the purposes of this Act . . .

In the case of settlements which came into operation prior to 1926 there may be a difficulty in determining whether the property is held on a binding trust for sale or whether it is merely subject to a power of sale. This is a matter of supreme importance because if it is a binding trust for sale the legal estate remains in the trustees, but if the property was only subject to a power of sale the legal estate was on the 1st January, 1926, automatically vested in the person having the powers of a tenant for life under the settlement.

An illustration of this difficulty is shown by a case where real estate had been conveyed to trustees on trust either to retain or sell and to hold the trust fund on certain trusts. It was held that this was a settlement as the trustees had a discretionary power as to selling, and there was nothing to show that a sale was actually intended.[1]

Now this doubt will not arise having regard to Section 25 (4) of the Law of Property Act, 1925, which provides that where a disposition or settlement coming into operation after 1925 contains a trust either to retain or sell it will be construed as a trust to sell with power to postpone the sale.

2. Trustees for Sale

These, as the words imply, are trustees holding land upon trust for sale, and "trust for sale" is

[1] *White's Settlement, Re*; *Pitman* v. *White*, [1930] 1 Ch. 179.

thus defined by Section 205 (xxix) of the Law of Property Act, 1925—

> Trust for sale in relation to land means an immediate binding trust for sale, whether or not exerciseable at the request or with the consent of any person, and with or without a power at discretion to postpone the sale: "trustees for sale" mean the persons (including a personal representative) holding land on trust for sale.

In addition to the ordinary trustees for sale who are expressly appointed by deed or will, there is another class either constituted by Statute or expressly appointed to take the place of those at first constituted by Statute, and these may be termed "statutory trustees for sale." This class arose mainly in consequence of the abolition of the holding of a legal estate in an "undivided share" in land, and of the forbidding of the holding of a legal estate by infants. These matters will form the subject of chapters on "Undivided Shares" and "Infants" respectively.

3. Trustees

The person on whom is imposed the duty of dealing with the trust property for the benefit of the beneficiaries is called the trustee. Trustees may also be trustees for sale in cases where the settlement or will by which they are appointed includes both real and personal property.

CHAPTER V

TRUSTEES' POSITION WITH REGARD TO LAND

It is necessary to consider the position of settled land trustees and trustees for sale, and it will be seen that the position is entirely different in each case. We have already seen that, in the case of personal property, there is first the legal ownership and secondly the beneficial ownership, but in the case of land there may be three capacities in which land can be held or enjoyed: there is, first of all, the ownership of the legal estate, which ownership alone gives the power of dealing with the land itself; secondly, there may be an ownership of a partial interest, that is to say, an interest during life or for some definite period or an interest liable to terminate on the happening of a certain event, and there is, thirdly, the absolute and beneficial ownership of the reversion in the property.

Although in the case of a trust for sale (as in the case of personal property) the legal estate in the property comprised in the settlement—or "trust," as it is more frequently referred to in order to distinguish it from a settlement which comes within the purview of the Settled Land Act—is in the trustees who have the power of managing the property and of disposing of it, in the case of "settled land" the ownership is in the person who is called "the tenant for life" of the property. The next chapter will be devoted to the consideration

of the question as to who is a tenant for life. The tenant for life, however, does not actually deal with the property under any power in the settlement itself, that is to say, the settlement is not the deed he has to produce in order to prove his title to the property. He has to be armed with what is called a "vesting deed" or a "vesting assent," that is, a deed or document, in the case of a vesting deed "signed, sealed, and delivered," and in the case of a vesting assent "signed" by the trustees of the settlement certifying that he is the tenant for life. A form of such a deed and of an assent will be found on pages 93 and 94. After the deed or assent has been so given to the tenant for life, the trustees, as it were, recede into the background. So long as there are no dealings with the property which will give rise to any capital money, the trustees really have no part to play, unless there should be wilful waste or spoiling of the property by the act or default of the tenant for life, when they would be entitled to step in for the protection of the property.

When, however, a transaction takes place, such as a sale, the trustees are the persons who receive and deal with the consideration money arising from such transaction, and they are made parties to the deed carrying out such transaction and give a receipt for the money paid over. We shall see hereafter how such capital money can be dealt with by the settled land trustees.

A tenant for life is also regarded as a trustee although he does not become the custodian of any

capital money, but he is a trustee in the sense that the legal estate is committed to him as a trustee for his successor, and so that in his dealings and management of the property he must have regard to the position of those entitled to the reversion, and, consistently with his own right to enjoy what may be termed "the fruits of the earth," i.e. the right to have the use and occupation, or to receive the rent and profits of the property, he must see to the preservation thereof.

Thus it may well happen that the settled land trustees may never have the legal estate in the land vested in them and never be able to sell it, though, as will be shown in the next chapter, there may be times when the land will be vested in the trustees.

This is briefly the position when a man is making a settlement of his property on marriage—

There are two courses open to him. He may make a conveyance of the property to trustees and declare that they shall hold it on trust for sale—in this case the settlement is in no way affected by the Settled Land Act. On the other hand, he may make a settlement under which he wishes to be the tenant for life. This would be accomplished by two deeds; there would be the settlement (which would be technically termed "the trust instrument") which would set out the trusts, and there would also be a "vesting deed" as described above. In this case the legal estate would be retained by the settlor, and, as tenant for life, he would be entitled to keep the title deeds relating to the

property. It would be probable that amongst the deeds thus held by the settlor there would be one evidencing his title before he made the settlement, and it would thus be possible for him to sell the property without disclosing the vesting deed. Hence we see some precaution has to be taken by the trustees. This is done by endorsing on the latest deed a note or memorandum of the execution of the vesting deed, so that any person dealing with the settlor after the execution of the settlement has notice that the property is settled and that there must be settled land trustees to receive any money paid by him.

Wherever there is "settled land" and a "tenant for life" the land cannot be dealt with until the "settled land trustees" have executed a vesting deed or vesting assent, and the settled land trustees are bound to execute this when required by the tenant for life. Although the settlement may have been executed before 1926 (when the Settled Land Act, 1925, came into force), and although in all cases where there was a tenant for life then existing the legal estate in property was automatically vested in him by paragraph 6 (*c*) of Part II of the First Schedule of the Law of Property Act, 1925, no dealings can be effected with such legal estate until a vesting deed or vesting assent has been first executed. This provision for such a deed or assent is made by Section 13 of the Settled Land Act, 1925, and reads as follows—

> Where a tenant for life or statutory owner has become entitled to have a principal vesting deed or a vesting assent

executed in his favour, then until a vesting instrument is executed or made pursuant to this Act in respect of the settled land, any purported disposition thereof *inter vivos* by any person, other than a personal representative (not being a disposition which he has power to make in right of his equitable interests or powers under a trust instrument), shall not take effect except in favour of a purchaser of a legal estate without notice of such tenant for life or statutory owner having become so entitled as aforesaid, but, save as aforesaid, shall operate only as a contract for valuable consideration to carry out the transaction after the requisite vesting instrument has been executed or made, and a purchaser of a legal estate shall not be concerned with such disposition unless the contract is registered as a land charge.

It has been decided that separate vesting deeds may be given for separate parts of the settled land [1] and that in the case of a compound settlement, the trustees of the compound settlement are the trustees to execute the vesting deed.[2]

It has also been decided that a vesting deed was invalid where it did not deal with the compound settlement, but only the resettlement, and did not give the names of the trustees of the compound settlement and had not been executed by those trustees.[3] Where, however, the vesting deed was executed by the trustees of the compound settlement it was held to be valid, although it did not expressly state that the trustees were trustees of the compound settlement.[4]

The position of trustees for sale as regards land is altogether different from that of settled land trustees. The property itself will have been

[1] *Clayton's Settled Estates, Re,* [1926] Ch. 279.
[2] *Cradock's Settled Estates, Re*; [1926] Ch. 944.
[3] *Cayley and Evan's Contract, Re,* [1930] 2 Ch. 143.
[4] *Curwen, Re, Curwen* v. *Graham,* [1931] 2 Ch. 341.

conveyed to them upon trust for sale, or, if they are statutory trustees for sale by reason of the operation of the Law of Property Act, 1925, the legal estate may have been automatically vested in them. Such trustees, therefore, have the total management of the property, and they are the persons who alone can sell it or grant leases. Provision has, however, been made for such trustees to delegate many of their powers to the person who is entitled to the income of their trust, and this is a matter which is dealt with on page 57.

Thus it will be seen that it is a matter of supreme importance in every case where land is held in trust for persons for life that the exact nature of the trust should be understood. It is not always easy to determine whether the instrument by which the trust was created forms a settlement within the meaning of the Settled Land Act or whether it is sufficient to create a trust for sale; and an application to the Court of Chancery may be found necessary for guidance as to the true interpretation of such an instrument. Brief notes of some such applications and the results will be given in later chapters.

CHAPTER VI

WHO IS A TENANT FOR LIFE?

THIS is not a purely academic question but one of tremendous practical importance. In all cases where there is a person who is a tenant for life, or a person having the powers of a tenant for life, that person is entitled to have the control of the property included in the settlement. It may have been gathered from the preceding chapter that in general a tenant for life is a person who is entitled to the use and enjoyment of the property or to the receipt of the rents and profits thereof during his life. But this is not all; the term "tenant for life" and the list of persons having the powers of a tenant for life is a rather comprehensive one. These are set out in Sections 19 and 20 of the Settled Land Act, 1925, the first of which sections states who are "tenants for life" in the strict technical sense, whilst in Section 20 is a list of the descriptions of persons who have the powers of a tenant for life. For all practical purposes there is no difference in the position of the persons who come within the category of either section.

These are the sections in full—

19. (1) The person of full age who is for the time being beneficially entitled under a settlement to possession of settled land for his life is for the purposes of this Act the tenant for life of that land and the tenant for life under that settlement.

(2) If in any case there are two or more persons of full age so entitled as joint tenants, they together constitute the tenant for life for the purposes of this Act.

(3) If in any case there are two or more persons so entitled as joint tenants and they are not all of full age, such one or more of them as is or are of full age is or (if more than one) together constitute the tenant for life for the purposes of this Act, but this subsection does not affect the beneficial interests of such of them as are not for the time being of full age.

(4) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent, and notwithstanding any assignment by operation of law or otherwise of his estate or interest under the settlement, whether before or after it came into possession, other than an assurance which extinguishes that estate or interest.

In addition to this we have the following list of persons who are declared to have the powers of a tenant for life under Section 20—

(i) A tenant in tail, including a tenant in tail after possibility of issue extinct, and a tenant in tail who is by Act of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services;

(ii) A person entitled to land for an estate in fee simple or for a term of years absolute with or subject to, in any of such cases, an executory limitation, gift, or disposition over on failure of his issue or in any other event;

(iii) A person entitled to a base or determinable fee, although the reversion or right of reverter is in the Crown, or to any corresponding interest in leasehold land;

(iv) A tenant for years determinable on life, not holding merely under a lease at a rent;

(v) A tenant for the life of another, not holding merely under a lease at a rent;

(vi) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for any purpose;

(vii) A tenant by the courtesy;

(viii) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether or not subject to expenses of management or to a trust for accumulation of income for any purpose, or until sale of the land, or until forfeiture, cesser or determination by any means of his interest therein, unless the land is subject to an immediate binding trust for sale;

(ix) A person beneficially entitled to land for an estate in fee simple or for a term of years absolute subject to any estates, interests, charges, or powers of charging, subsisting or capable of being exercised under a settlement;

(x) A married woman entitled to land for an estate in fee simple or for a term of years absolute subject to a restraint on anticipation.

Section 23 of the Settled Land Act, 1925, provides that, in all cases where under a settlement there is no person who comes within the scope of a tenant for life or a person having the powers of a tenant for life, the powers under the Act are to be exercisable by the trustees, who in such cases are termed "Statutory Owners."

It is not surprising that difficult questions should have arisen on the interpretation of Sections 19 and 20, and that cases existed where persons entitled to the income of land could not well be brought within either of those two complicated sections. The following are some of the decisions which have been given on questions brought before the Court—

A person entitled to the income under trusts of a term of 99 years for the payment thereof to him if he should so long live is a person having the powers of a tenant for life.[1] A corporation may be a tenant for life; the words "of full age" in Section 20 meaning no more than "not being an infant" and are applicable to a corporation.[2] If a house is purchased in pursuance of a direction in a will as a residence for a testator's widow for life or until a certain event occurred, the widow has the powers of a tenant for life.[3] Where, however, a testator gave a widow the option to take a house at a yearly rental of £1 with an option of having such tenancy during her life, she was held not to have the powers of a tenant for life because the option was to have a tenancy at a rental.[4] Where (subject to a trust for raising money) there was a devise to trustees during the life of A. upon trust to manage and pay expenses and outgoings and an annuity and pay the balance of the rents to A. during his life, A. was deemed to have the powers of a tenant for life although there was not sufficient income to make any payment to him.[5] If property is left to trustees on trust to allow a person to reside there for life or during pleasure, that person is a person having the powers of a tenant for life.[6] In a case where the income of property devised to

[1] *Waleran (Baron) Settled Estates, Re*; [1927] 1 Ch. 522.
[2] *Carnarvon's (Earl) Chesterfield Settled Estates, Re*; *Re Carnarvon (Earl) Highclere Settled Estates*, [1927] 1 Ch. 138.
[3] *Hanson, Re*; *Hanson* v. *Eastwood*, [1928] Ch. 96.
[4] *Catling, Re*; *Public Trustee* v. *Catling*, [1931] W.N. 185.
[5] *Jones, Re*; (1884), 26 Ch. D. 736.
[6] *Acklom Re*; *Oakeshott* v. *Hawkins*, [1929] 1 Ch. 195.

trustees was undisposed of during certain lives so that it became payable to the testator's heir-at-law under an "implied" trust, such heir-at-law had the powers of a tenant for life under Section 20 (1) (viii) above quoted.[1] Where, however the income is payable to a person under a discretionary trust the person has not the powers of a tenant for life which are therefore vested in the trustees of the settlement.[2] There seems to be a rather fine distinction between the last two instances, which is presumably explained by the fact that it is the scheme of the legislature to give the powers to the person having the effective possessory ownership of the estate; in the latter case the person had no control over the discretionary powers of the trustees. Other decided cases showing that there were no persons having the powers of a tenant for life and that consequently such powers were vested in the trustees of the settlement are: Where annuities had been given by a will and property appropriated to provide same, and the residue of the property was held in trust for several persons on attaining 21 and only one had reached that age on the 1st January, 1926.[3] Where land was held by trustees on trust to receive and manage the land and pay two-thirds of the income to A. for life and to accumulate the other third as capital.[4] Where land was vested in trustees for a term of 1,000 years and subject thereto one moiety was vested in A. for

[1] *Llanover Settled Estates, Re*; [1926] Ch. 626.
[2] *Alston-Roberts-West's Settled Estates, Re*; [1928] W.N. 41.
[3] *Bird, Re*; *Watson* v. *Nunes*, [1927] 1 Ch. 210.
[4] *Frewen's Settled Estates, Re*, [1926] Ch. 580.

life and then for other persons, and the other moiety was vested in B. for life and then for other persons.[1]

Devolution of the Legal Estate in Settled Land on Death of the Tenant for Life

It has already been shown that on the 1st January, 1926, the legal estate in settled land automatically vested in the tenant for life or the person having the powers of a tenant for life and the only legal estates capable of subsisting in land are (1) an estate in fee simple absolute, or (2) an estate for a term of years absolute. Consequently arrangements had to be made for the devolution or "passing" of this legal estate on the death of a tenant for life. Had no such arrangements been made it would in all cases have passed to the executors or administrators of the tenant for life, and hence very likely pass into the hands of some person or persons who had no interest in the land.

To accomplish this purpose a special office was created, that of "Special Personal Representatives." The Administration of Estates Act, 1925, provides that a tenant for life may appoint the settled land trustees such special personal representatives, and it goes even further, and says that a tenant for life shall be "deemed" to have made such an appointment. Consequently on the death of a tenant for life, the trustees are in a position to apply for a special grant from the Court of Probate in respect of such settled land so that they

[1] *Stamford (Earl of) and Warrington, Re,* [1927] 2 Ch. 217.

will be in a position to get the legal estate, and so pass it on to the next person entitled as tenant for life, or to retain it if the powers of a tenant for life are then to be exercised by them. It is not proposed here to deal with the method of obtaining such grant.

If, however, on the death of the tenant for life the land ceases to be settled land within the meaning of the Settled Land Act, 1925, the legal estate will pass to the general personal representatives of the tenant for life, i.e. the executors of his will or to the administrators who apply for a grant of Letters of Administration in the case of the tenant for life having died intestate. When there is a case for a special grant, the general grant is called a "save and except" grant, as it is stated to be given in respect of the estate left by the deceased "save and except settled land." If on the death of the tenant for life the property passes to a person absolutely, and not merely for life or other limited estate, or if a trust for sale then arises, the property ceases to be settled land.

This was decided by a very notable case, *Re Bridgett & Hayes' Contract*, [1928] 1 Ch. 163, which is probably the case which has created the greatest surprise of all those decided on the 1926 legislation, and proved that a great deal of expense had been unnecessarily incurred by obtaining special grants and in appointing trustees when there was no occasion for it. Although the decision is generally acknowledged to be one of great convenience, its accuracy has been questioned as

it has been contended that it is contrary to several sections of the Settled Land Act. The author was probably the only writer who foreshadowed the decision though not on the grounds on which the case was decided, but on the ground that he considered Section 22 of the Administration of Estates Act, 1925, to mean that the appointment of Settled Land Act trustees as special personal representatives merely thereby qualified them to take out a grant in respect of the settled land, and that the legal estate would pass to them by virtue of this grant, and not automatically on the death of the tenant for life. This, however, is a purely academic question as the machinery of the Probate Court now ensures that if there is settled land which continues to be such on the death of the tenant for life it must be excluded from the general grant, which must be a "save and except" grant. In this respect it should be noticed that the continuity of the land as settled land need not be under the same settlement as if the remainderman has settled the property which was subject to the life interest the effect will be that the two settlements constitute a compound settlement, and the trustees of the earlier settlement are entitled to the grant.[1]

In all cases where a special grant is obtained by the trustees they will, if the succeeding tenant for life should happen to be an infant, or if there is no person having the powers of a tenant for life, retain the legal estate. In all other cases they will, after seeing that all death duties or any other

[1] *Re Taylor*, [1929] P. 260.

charge then arising is provided for, pass on the legal estate by means of a vesting assent, a form of which will be found in the Appendix of Forms.

The rules regulating vesting assents on all future successions are contained in Section 7 of the Settled Land Act, 1925, which provides—

7. (1) If, on the death of a tenant for life or statutory owner, or of the survivor of two or more tenants for life or statutory owners, in whom the settled land was vested, the land remains settled land, his personal representatives shall hold the settled land on trust, if and when so required to do to convey it to the person who under the trust instrument or by virtue of this Act becomes the tenant for life or statutory owner, or, if more than one, as joint tenants.

(2) If a person by reason of attaining full age becomes a tenant for life for the purposes of this Act of settled land, he shall be entitled to require the trustees of the settlement, personal representatives, and other persons in whom the settled land is vested, to convey the land to him.

(3) If a person who, when of full age, will together with another person or other persons constitute the tenant for life for the purposes of this Act of settled land attains that age, he shall be entitled to require the tenant for life, trustees of the settlement, personal representatives or other persons in whom the settled land is vested to convey the land to him and the other person or persons who together with him constitute the tenant for life as joint tenants.

(4) If by reason of forfeiture, surrender, or otherwise the estate owner of any settled land ceases to have the statutory powers of a tenant for life and the land remains settled land, he shall be bound forthwith to convey the settled land to the person who under the trust instrument, or by virtue of this Act, becomes the tenant for life or statutory owner, and, if more than one, as joint tenants.

(5) If any person of full age becomes absolutely entitled to the settled land (whether beneficially, or as personal representative, or as trustee for sale, or otherwise) free from all limitations, powers, and charges taking effect under the settlement, he shall be entitled to require the trustees of

the settlement, personal representatives, or other persons in whom the settled land is vested, to convey the land to him, and if more persons than one being of full age become so entitled to the settled land they shall be entitled to require such persons as aforesaid to convey the land to them as joint tenants.

Although it is impossible to deal with settled land as such without a vesting deed or vesting assent, if the whole legal and equitable estate becomes united in one person so that he can convey the land as beneficial owner there is no need for any vesting instrument. Section 13 of the Settled Land Act only refers to dispositions under or by the aid of that Act. Accordingly where a tenant in tail in possession in whom the legal estate had become automatically vested disentailed the property it was held he could dispose of it without any vesting assent, as on the execution of the deed of disentail the land ceased to be settled land.[1]

[1] *Alefounder's Will Trusts, Re*; *Adnams* v. *Alefounder*, [1927] 1 Ch. 360.

CHAPTER VII

POWERS OF MANAGEMENT

We have now to consider the powers of trustees in regard to the management of the land comprised in the settlement or subject to their trust, but before doing so there are a few preliminary matters to be noticed as to the principles governing these powers.

We have already seen that in the case of settled land the powers are vested in the person who is the tenant for life or person having the powers of a tenant for life. These powers are set out in the Settled Land Act, 1925, and are, of course, to be observed in conjunction with any powers set out in the settlement itself, but it must be quite distinctly understood that the powers conferred by the Act cannot be curtailed in any way, and if there should be any clause in a settlement endeavouring to restrict such powers such clause is void and of no effect, and should be disregarded. It is possible, however, to add to the powers given by the Act. Furthermore, the powers are exerciseable by the tenant for life notwithstanding that he may have parted with his life interest by sale or mortgage; the powers are not assignable, and a tenant for life is precluded from entering into any contract not to exercise his powers, and such a contract would be absolutely void.

At the same time, a tenant for life is not

permitted to do as he likes with the property; there are some protective measures for the benefit of the inheritance. Whenever a tenant for life proposes to sell, exchange, or to grant an option for a lease or sale, or to mortgage, he must give notice of his intention to each of the settlement trustees by posting a registered letter containing the notice addressed to the trustees severally at their usual or last known places of abode in the United Kingdom, and must also give a like notice to the solicitor acting for the trustees, if any such solicitor is known to the tenant for life, by like registered letter. This notice must be posted not less than one month before the making or granting by the tenant for life of any sale, exchange, lease, mortgage or option, and there must be two trustees at least of the settlement at the time, unless the sole trustee is a "Trust Corporation." The notice may be a general notice in which case, on the request of the trustees, the tenant for life must from time to time furnish to the trustees reasonable particulars of sales, exchanges, or leases effected or in progress or immediately contemplated, but in the case of a mortgage there must be a specific notice. A trustee may, however, in writing, waive notice in any particular case or may agree to accept less than a month's notice. In the event of there being only a single trustee, not a trust corporation, an additional trustee must be appointed before the transaction can be carried out if capital money arises.

A "Trust Corporation" means the Public Trustee or a Corporation either appointed by the Court

in any particular case to be a trustee, or entitled by rules under subsection (3) of Section 4 of the Public Trustee Act, 1906, to act as custodian trustee, and by the Law of Property (Amendment) Act, 1926, the term "Trust Corporation" has been enlarged to include also the Treasury Solicitor, the Official Solicitor, and any other person holding an official position nominated by the Lord Chancellor, or in the case of bankruptcy, the Trustee in Bankruptcy or the Trustee of a Deed of Assignment.

Although a tenant for life is thus required to give notice, he does not require the consent of the trustees to carry out any of his statutory powers except in a few cases where, in the absence of any provision to the contrary in the settlement, he must obtain the consent of the trustees or the leave of the Court. These cases are, the sale, exchange, or lease of the principal mansion house and the pleasure grounds and park and lands usually occupied therewith or, if the tenant for life is "impeachable for waste," when he wishes to cut the timber. If he wishes to sell chattels which are settled to go with the land (which are commonly though improperly termed "heirlooms") he must first obtain the leave of the Court.

Provision has also been made to provide for the contingency where a tenant for life who in consequence of bankruptcy, or an assignment by way of sale or mortgage of his life interest, unreasonably refuses to exercise any power to the detriment of the estate. In this case an application can be

made to the Court by any person interested in the settled land for an order authorising the trustees of the settlement to exercise any of the powers in the name of the tenant for life. When such an order is granted it is registered as a Land Charge under the Land Charges Act, 1925, so as to give notice to any person dealing with the land affected.

In all cases where land is subject to a trust for sale the powers of management are vested in the trustees. There may be powers set out in the trust deed, and it has been provided by Section 28 of the Law of Property Act, 1925, that trustees for sale have all the powers of a tenant for life and of the trustees of a settlement under the Settled Land Act, 1925.

When mention is made of "an immediate binding trust for sale" it does not by any means imply that a sale must take place at once or at all. The trust is inserted in the deed as a means whereby a sale can be effected if required. A trust for sale endures until property has been conveyed to or by the direction of the persons entitled to the proceeds of sale, and there is always a power to postpone sale unless there is a contrary intention expressed in the trust deed.

In the exercise of their powers the trustees must, so far as practicable, consult the persons of full age for the time being entitled to the rents and profits of the land until sale and give effect to the wishes of such persons so far as this is consistent with the general interests of the trust and, in case of dispute, the trustees may give effect to

the wishes of the majority (according to the value of their combined interests) of such persons.

With regard to this power to postpone sale it has been held that where land is given by will to trustees on trust for sale with power to postpone, the trustees cannot postpone the sale at their discretion after all the beneficiaries have become absolutely entitled, and that the trustees must then sell unless the beneficiaries elect to take the property in its unconverted state. Also that the statutory power to postpone does not apply where there is an express power, and that the statutory power also ceases when the trust fund becomes divisible.[1]

In the case of a trust for sale it is often expressly provided in the trust instrument that the sale is to be with the consent of the person enjoying the life interest, or, it may be, with the consent of all or several of the beneficiaries. In such a case the consent of any two is sufficient to satisfy a purchaser though for their own protection the trustees would obtain the consent of all specified persons.

In a case where a deed directed that a trust for sale should be exercised with the consent of the tenant for life and the tenant for life being bankrupt refused to give his consent, it was held that the Court may under Section 30 of the Law of Property Act, 1925, authorise the trustees to carry out the sale notwithstanding that the consent could not be obtained.[2]

[1] *Re Ball, Jones,* v. *Jones,* [1930] 74 S.J. 298.
[2] *Re Beale's Settlement Trust,* [1931] W.N. 233.

Trustees for sale have power under Section 28 (3) of the Law of Property Act, 1925 to apportion property by way of partition amongst the persons entitled thereto. This section is as follows—

Where the net proceeds of sale have under the trusts affecting the same become absolutely vested in persons of full age in undivided shares (whether or not such shares may be subject to a derivative trust) the trustees for sale may, with the consent of the persons, if any, of full age, not being annuitants, interested in possession in the net rents and profits of the land until sale—

(*a*) partition the land remaining unsold or any part thereof; and

(*b*) provide (by way of mortgage or otherwise) for the payment of any equality money;

and, upon such partition being arranged, the trustees for sale shall give effect thereto by conveying the land so partitioned in severalty (subject or not to any legal mortgage created for raising equality money) to persons of full age and either absolutely or on trust for sale or, where any part of the land becomes settled land, by a vesting deed, or partly in one way and partly in another in accordance with the rights of the persons interested under the partition, but a purchaser shall not be concerned to see or inquire whether any such consent as aforesaid has been given:

Provided that—

(i) If a share in the net proceeds belongs to a lunatic or defective, the consent of his committee or receiver shall be sufficient to protect the trustees for sale;

(ii) If a share in the net proceeds is affected by an incumbrance the trustees for sale may either give effect thereto or provide for the discharge thereof by means of the property allotted in respect of such share, as they may consider expedient.

(4) If a share in the net proceeds is absolutely vested in an infant, the trustees for sale may act on his behalf and retain land (to be held on trust for sale) or other property to represent his share, but in other respects the foregoing power shall apply as if the infant had been of full age.

POWER OF SALE

A tenant for sale has an absolute power to dispose of the settled land or any part thereof in the same way as an absolute owner can. Consent may be necessary in the case of the "Principal Mansion House" as explained later. The only practical difference in the case of a sale by a tenant for life is that there must be two trustees or a trust corporation to receive the purchase money.

A tenant for life is entitled to the custody of the title deeds, and his title to sell is evidenced by his vesting deed or vesting assent which must show (1) that the legal estate is vested in him, (2) that it comprises or relates to the property being dealt with, and (3) who are the trustees for the purposes of the Settled Land Act, and as such the persons to give a proper receipt for the purchase money.

On a sale or mortgage by a tenant for life the property comprised in the conveyance or mortgage will be discharged from the limitations and trusts of the settlement other than—

(i) legal estates and charges by way of legal mortgage having priority to the settlement; and

(ii) all legal estates and charges by way of legal mortgage which have been conveyed or created for securing money actually raised at the date of the deed.

In these two cases it must either be arranged that the mortgagees join in the deed or that their mortgage is previously paid off. All other equitable charges (if any) will attach to the purchase money

or the investments representing the same according to the respective priority of such charges.

Principal Mansion House

This is an expression frequently met with in the case of settled land, but it must be borne in mind that there are many thousands of settlements which include no principal mansion house. The Settled Land Act, 1925, explains what is *not* a principal mansion house in subsection (2) of Section 65 as follows—

> Where a house is usually occupied as a farmhouse, or where the site of any house and the pleasure grounds and park and lands, if any, usually occupied therewith do not altogether exceed 25 acres in extent, the house is not to be deemed a principal mansion house within the meaning of this section, and may accordingly be disposed of in like manner as any other part of the settled land.

The law governing the sale of the principal mansion house is that in cases where the settlement came into operation before 1926, and contains no provision to the contrary, the consent of the trustees or an order of Court must be obtained. Where, however, the settlement came into operation after 1925, the sale may be made by the tenant for life without such consent or order unless the settlement directs to the contrary.

In cases where there is such a direction it should be referred to in the vesting deed.

Where heirlooms are settled with settled land the tenant for life MUST obtain an Order of the Court before he can sell them, and to get such an order he would have to prove to the Court that it

would be to the benefit of the parties interested that such sale should take place. The purchase money on any such sale would be capital money arising under the Act.

By virtue of Section 130 of the Law of Property Act, 1925, personal chattels may now be settled without reference to settled land on trusts which create an entailed interest therein. It has been provided that these chattels may be sold by the trustees with the consent of the tenant for life for the time being if of full age, and that the net proceeds of any such sale shall be held in trust for and shall go to the same persons successively, in the same manner and for the same interests, as the chattels would have been held if they had not been sold, and the income of investments representing such proceeds of sale shall be applied accordingly.

Powers of Charging or Mortgaging the Trust Property

It frequently happens in the management of property that some repair or improvement is urgently needed at a time when there is no capital money available, or the property may be subject to a charge the repayment of which has to be provided for. To meet these requirements we must consider what statutory provision has been made.

Section 16 of the Trustee Act, 1925, provides—

(1) Where trustees are authorised by the instrument, if any, creating the trust or by law to pay or apply capital money subject to the trust for any purpose or in any manner,

they shall have and shall be deemed always to have had power to raise the money required by sale, conversion, calling in, or mortgage of all or any part of the trust property for the time being in possession.

(2) This section applies notwithstanding anything to the contrary contained in the instrument, if any, creating the trust, but does not apply to trustees of property held for charitable purposes, or to trustees of a settlement for the purposes of the Settled Land Act, 1925, not being the statutory owners.

This is followed by a very useful clause exonerating any proposed lender—

17. No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in trustees, shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof.

Section 71 of the Settled Land Act, 1925, authorises a tenant for life or person having the powers of a tenant for life to raise money on mortgage for any of the following purposes—

(*a*) To pay off existing charges on the estate;

(*b*) To raise any sums required for portions;

(*c*) To pay for any improvements authorised by the Act;

(*d*) To pay compensation on the enfranchisement of copyhold property.

Powers to Grant Leases

A tenant for life is empowered by Section 41 of the Settled Land Act, 1925, to grant leases—

(*a*) For building purposes, or to the Forestry Commissioners for a term not exceeding 999 years;

(*b*) For mining purposes for a term not exceeding 100 years;

(*c*) For other purposes, for a term not exceeding 50 years.

An agreement for a term not exceeding three years may be by writing under hand only, but otherwise the lease must—

(1) Be by deed to take effect in possession not later than twelve months after its date, or in reversion after an existing lease having not more than seven years to run;

(2) Reserve the best rent reasonably obtainable;

(3) Contain a covenant for payment of rent and a condition of re-entry if unpaid for a period not exceeding thirty days;

(4) A counterpart of the lease must be executed and kept by the tenant for life.

Where the term is not to exceed 21 years the lease may be granted without notice to the trustees or even if there are no existing trustees of the settlement.

As to building leases, it is provided by Section 44 of the Settled Land Act, 1925, that a peppercorn rent or a nominal rent may be reserved for the first five years, and that when the property is let in lots the rent must not be less than ten shillings for any lot, and the total for all lots must not be less than should be got for the land as a whole. The rent should not exceed one-fifth of the full annual value of the land with the buildings thereon.

As to forestry leases, Section 48 of the same Act

provides that they may reserve a peppercorn or nominal rent for the first ten years or any less part of the term, and that the rent may be made ascertainable by, or to vary according to, the value of the timber cut and carried away or disposed of, or it may be of a fixed amount with power for the lessee to make up any deficiency in a subsequent period in case the rent, according to value in any specified period does not produce an amount equal to the fixed or minimum rent. The lease may also contain provisions for sharing the proceeds or profits of each year.

As to mining leases, Section 45 (1) of the Act makes the following provisions—

(i) the rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf; and

(ii) the rent may also be made to vary according to the price of the minerals or substances gotten, or any of them, and such price may be the saleable value, or the price or value appearing in any trade or market or other price list or return from time to time, or may be the marketable value as ascertained in any manner prescribed by the lease (including a reference to arbitration), or may be an average of any such prices or values taken during a specified period; and

(iii) a fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent according to acreage or quantity or otherwise, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

Section 47 of the same Act provides that under a mining lease, whether the mines or minerals leased

are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside as capital money arising under the Act part of the rent as follows: namely, where the tenant for life or statutory owner is impeachable for waste in respect of minerals three-fourths parts of the rent, and otherwise one-fourth part thereof, and in every such case the residue of the rent shall go as rent and profits.

Waste

There are frequent references in settlements to "waste" or "without impeachment of waste," and it may be as well to define what is meant by "waste." "Waste" is described as "a spoil either in houses, woods, lands, etc., by a tenant for life or years to the prejudice of the heir or reversioner." Whatever does a lasting damage to the freehold or inheritance is waste. Waste may be either voluntary, such as the pulling down of a building, or it may be permissive—a mere omission—as by allowing a building to fall down for the want of repair.

In order that a tenant for life may have the more full enjoyment of the settled land, and to limit the liability of the trustees when they have the management of property, it is customary to settle the property on persons "without impeachment of waste," and when this is done the tenant for life may commit all kinds of waste. For instance, he may cut down timber, except such as may have

been planted for the sake of ornament or shelter, sell the timber, and take all the proceeds as income. When the tenant for life is impeachable for waste, as he will be in the absence of words to the contrary, he cannot cut down any timber except for thinning purposes or for repair of houses or fences or implements of husbandry. By virtue of Section 66 of the Settled Land Act, however, he may on obtaining the consent of the trustees of the settlement or an Order of the Court, cut and sell timber on the land which is ripe and fit for cutting, in which case three-fourths of the proceeds of sale must be set aside as capital money arising under the Act, and the other one-fourth will go to the tenant for life as income.

Even when a tenant for life is impeachable for waste, he is not generally, in the absence of anything to the contrary in the settlement, liable for mere permissive waste—i.e. for allowing the property to fall into disrepair. Therefore when it is intended that the tenant for life is to be liable for repairs it should be so stated in the settlement.

Insurance of Property

Before 1926, there was no statutory provision dealing with the question of the insurance of trust property though there had been decisions of the Court as to who was entitled to the insurance money in case of fire.

The Trustee Act, 1925 (Sections 19 and 20) now gives to trustees power to insure against loss or damage by fire any insurable property to any

amount not exceeding three-fourths of the value thereof, and to pay the premiums out of income without the consent of the person entitled to the income; but this power does not apply in the case of property which a trustee is bound forthwith to convey absolutely to a beneficiary on request.

All money received under any policy of insurance is to be regarded as capital and so dealt with; i.e. if the money is received in respect of the settled land the money must be regarded as capital money arising under the Settled Land Act, and if the money is received in respect of the destruction of heirlooms it is to be dealt with as the proceeds of sale of such heirlooms would be dealt with, either in the purchase of other chattels of the same or any other nature to be settled upon the same trusts or generally as capital money arising under the Act. The policy money may be applied in rebuilding or reinstating the property.

Delegation of Management by Trustees for Sale

Section 29 of the Law of Property Act, 1925, provides that trustees for sale may delegate their powers of management without being responsible for the acts of the person to whom the power is delegated. This section is as follows—

> (1) The powers of and incidental to leasing, accepting surrenders of leases and management, conferred on trustees for sale whether by this Act or otherwise, may, until sale of the land, be revocably delegated from time to time, by writing, signed by them, to any person of full age (not being merely an annuitant) for the time being beneficially entitled

in possession to the net rents and profits of the land during his life or for any less period; and in favour of a lessee such writing shall, unless the contrary appears, be sufficient evidence that the person named therein is a person to whom the powers may be delegated, and the production of such writing shall, unless the contrary appears, be sufficient evidence that the delegation has not been revoked.

(2) Any power so delegated shall be exercised only in the names and on behalf of the trustees delegating the power.

(3) The persons delegating any power under this section shall not, in relation to the exercise or purported exercise of the power, be liable for the acts or defaults of the person to whom the power is delegated, but that person shall, in relation to the exercise of the power by him, be deemed to be in the position and to have the duties and liabilities of a trustee.

It will thus be seen that when powers are delegated under the above section the person entitled to the income is in practically the same position as he would be if he were the tenant for life under a strict settlement, except that the power is revocable, and that it would not enable him to sell the property, which would have to be accomplished by the trustees under their trust for sale.

Repair and Improvement of Property

The object of the Settled Land Act, 1925, is to place the tenant for life in a similar position as regards the use and enjoyment of the property as he would be in if it were his own absolute property except, of course, that he is unable to take any of the capital value of the property. With regard to the property of infants, special provisions have been made. (See page 84.)

A detailed schedule of repairs and improvements which might be required in the case of large family

estates has been prepared, and arranged under three headings having regard to the permanency or otherwise of each particular item. Class I consists of matters which the trustees are authorised to pay for out of capital money in their hands or to be raised for that purpose under the powers of mortgaging conferred by the Act. Class II consists of matters which trustees are permitted to carry out with capital money and to exercise their own discretion as to whether the tenant for life shall be required to replace such capital money by instalments. Class III consists of matters more in the nature of tenants' fixtures, and it is required that the cost of these matters must be repaid by instalments by the tenant for life. This repayment will not constitute a debt against the estate of the tenant for life in the event of his death, but it is in the nature of an annual sum charged on the inheritance for a number of years. Full details of these repairs and improvements will be found in Appendix A. A similar schedule, though on a smaller scale, was included in the Settled Land Act of 1882, but the present schedule has been much modernised.

Under the old Settled Land Acts, 1882 to 1890, when a tenant for life desired to expend capital money on improvements it was necessary for him to submit a scheme showing the proposed expenditure for the approval of the trustees or the Court. Now, by the Act of 1925, the trustees may apply the money on—

(i) A certificate to be furnished by a competent engineer or able practical surveyor employed independently of the

tenant for life certifying that the work or operation comprised in the improvement, or some specific part thereof, has been properly executed and what amount is properly payable in respect thereof; or

(ii) An Order of the Court directing or authorising the trustees so to apply a specified portion of the capital money.

In the case of Class II or III where the money is repayable by instalments this repayment must be by not more than fifty half-yearly instalments, and the tenant for life may create a rent-charge on the property to secure these instalments. Such rent-charge would be in favour of the trustees, and would cease on the sale of the settled land.

The provisions as regards improvements can, it appears, be made to apply to improvements which were executed before 1926. For instance, in a case where the tenant for life had installed electric light in the mansion house and adjoining cottages in 1919, the Court held that this was an improvement that would have to be made sooner or later, and made an order that the cost of the installation should be paid out of capital, and that the sum should be repayable by the tenant for life by twenty half-yearly instalments, the first being regarded as having fallen due on the 20th June, 1926.[1]

There have been several cases on the question of the repair of property held on trust for sale, arising out of Section 28 (2) of the Law of Property Act, 1925, which reads—

Subject to any direction to the contrary in the disposition on trust for sale or in the settlement of the proceeds of sale, the net rents and profits of the land until sale, after keeping

[1] *Re Jacques Settled Estates*, [1930] 2 Ch. 418.

down costs of repairs and insurance and other outgoings shall be paid or applied, except so far as any part thereof may be liable to be set aside as capital money under the Settled Land Act, 1925, in like manner as the income of investments representing the purchase money would be payable if a sale had been made and the proceeds had been duly invested.

Does this mean that the cost of all repairs must be paid out of income?

In the first case, land was settled in favour of a tenant for life and required substantial structural repairs.[1] It was held that these repairs were authorised by Section 102 (2) (*b*) of the Settled Land Act, 1925, and were payable out of the income of the settled land. That subsection really applies to management on behalf of infants, and gives power to the trustees to "erect, pull down, rebuild, and repair houses and buildings and erections." His Lordship (Clauson J.) said that even if, on the proper construction of Section 28 (2) of the Law of Property Act, 1925, which provides that "Trustees for sale shall have all the powers of a tenant for life and the trustees of a settlement under the Settled Land Act, 1925, including in relation to the land the powers of management conferred by that Act during a minority" those powers were only exerciseable during a minority, the expenses incurred would nevertheless still be payable out of income by virtue of Section 28 (2) of the Law of Property Act, 1925, since the word "repairs" in that subsection has the same meaning as the word "repair" in Section 102 (2) (*b*) of the Settled Land Act, 1925. It was therefore not

[1] *Re Gray; Public Trustee* v. *Woodhouse,* [1927] 1 Ch. 242.

necessary that the cost of the repairs under such circumstances should be apportioned between capital and income on the principle adopted in "*Re Hotchkys.*" His Lordship further said: "Having the statutory power he (the trustee) is in a wholly different position from that trustee whom the Court assisted in '*Re Hotchkys.*' There being then no statutory power the Court had to apply general equitable principles. I see no reason why the Court, having the Statute before it, should fall back upon those principles. I see no reason why the Courts should not leave the trustee to deal with the matter under the statutory power given him by the legislature, and under those circumstances it appears to me that the right course for the trustee to take is to use the statutory power and pay for those repairs out of income."

It will be seen, however, that this decision was soon varied. In a case which came before Mr. Justice Tomlin[1] it was held that the words "after keeping down costs of repairs and other outgoings" in Section 28 (2) of the Law of Property Act, 1925, did not make it obligatory on trustees for sale acting under that section to pay the costs of all repairs out of income. The trustees had a discretion and if, in the exercise of that discretion, they decided to pay the costs out of income the Court will not interfere, but where the trustees ask the Court to say how the costs of particular repairs ought to be borne, the principle laid down in "*Re Hotchkys*" will be applied.

[1] *Re Robins, Holland* v. *Gillam,* [1928] Ch. 721.

(The principle referred to was that trustees for sale were under an obligation to keep the property in saleable condition, and that the money must be raised in such a way as not to throw the burden unfairly either upon the tenant for life or upon the remainderman.) [1]

Where the residuary estate comprised old freehold property the income of which was payable to a widow for life, and that property had been kept in tenantable repair out of income but a considerable outlay was needed to comply with dangerous structure notices, it was held that the necessary expense of repairs consequent upon the notices was payable out of capital, and could be raised by mortgage.[2]

Where property had been bequeathed to trustees upon trust for sale with power to postpone sale and with interim powers of management and where a considerable outlay was necessary on the property, Mr. Justice Clauson held that the repairs being of the nature of a structural reconstruction could be paid for out of capital, and he then stated that the view he had expressed in *Re Gray* (*supra*) as to the continuance of the equitable jurisdiction of the Court according to the principle of "*Re Hotchkys*," in view of the very definite powers given to trustees by the new Acts, was intended to be no more than a dictum.[3]

In a case which came before Mr. Justice

[1] *Re Hotchkys* (1886), 32 Ch. D. 408.
[2] *Whitaker, Re*; *Rooke* v. *Whitaker*, [1929] 1 Ch. 662.
[3] *Conquest, Re*; *Royal Exchange Assurance* v. *Conquest*, [1929] 2 Ch. 353.

Maugham where an intestate had left freehold cottages in a bad state of repair and a widow had a life interest, it was held—

1. That the Court has jurisdiction to direct payment for repairs out of capital if the trustees for sale ask the Court's advice;

2. That there is nothing in the Administration of Estates Act, 1925, to support the view that the widow was entitled to have repairs required at the date of the testator's death paid for out of capital irrespective of the nature of the repairs;

3. That all repairs which are improvements within Parts I or II of the Third Schedule to the Settled Land Act, 1925, should be paid for out of capital; and

4. That repairs which are not improvements within those parts of that Schedule ought to be borne by capital if they constitute permanent improvements.[1]

In dealing with the question of repairs so far, it has been assumed that the property is freehold. The case is different in the case of property held on lease. Although a tenant for life is not liable to keep property in repair unless the responsibility is put on him by the settlement under which he enjoys the property, this would not apply to leaseholds because the tenant for life must hold the property on the terms of the lease. Any repairs to leasehold property necessary at the death of the settlor should, therefore, be paid for out of his estate, but the liability will fall on the tenant for

[1] *Re Smith, Vincent* v. *Smith*, [1930] 1 Ch. 88.

life during the continuance of his interest in the property.

Miscellaneous Powers of Management

In addition to the powers of sale, leasing, and mortgaging for specific purposes, there are various other powers of management conferred on a tenant for life. He may accept surrenders of leases and grant new leases, provided such new leases are in conformity with the provisions of the Act, and on condition that, if any payment is made as consideration for a surrender, the same must be regarded as capital money. The tenant for life may also accept leases of land or minerals convenient to be held or worked in conjunction with the settled land, and such leases may contain an option to purchase. He may also on any transaction grant or reserve any easements, rights, or privileges over or affecting the settled land. He may, with the consent of the owners of the incumbrance, shift any incumbrance from one part of the settled land to another. This is sometimes useful when it is proposed to sell a portion of the land for building purposes and there is a mortgage on it. The tenant for life may also grant to any person an option to take a lease or to purchase all or any portion of the settled land at a rent or price to be fixed on the granting of such option. Any such option must be exerciseable within a period not exceeding ten years, and the rent or price must be the best obtainable. The price may be a specified sum or a stated number of years' purchase on the rental. Any sum

paid for the granting of any such option is capital money.

For the development or improvement of the settled land, the tenant for life is also empowered to grant or lease water rights to any authority having statutory powers to supply water to the place in which the settled land or any part thereof is situate, but any money thus obtained, other than rent, is to be capital money.

A tenant for life may also grant or lease land at a nominal price or rent, or gratuitously for—

(i) Various public buildings, or

(ii) For a railway, canal, road, dock, sea-wall, embankment drain, watercourse, or reservoir, or

(iii) For any other public or charitable purpose.

The area of land under (i) or (iii) must not exceed one acre, or under (ii) five acres, unless such excess is paid for or a proper rent reserved in respect of it.

A tenant for life may also in connection with a sale or grant of a lease for building purposes or the development of the settled land as a building estate, or at any other reasonable time, for the general benefit of the residents on the settled land, lay out any part of the settled land for streets, open spaces, and other purposes. He may also grant or lease land for the erection of working-class dwellings or for gardens to be held therewith or for the purposes of the Small Holdings and Allotments Acts, 1908 to 1919 at a nominal price or rent

or gratuitously, but subject to the condition that, except under an Order of the Court, not more than 2 acres in an urban district, or 10 acres in a rural district, in any one parish must be so granted or leased.

CHAPTER VIII

INVESTMENT OF CAPITAL MONEY UNDER THE SETTLED LAND ACT

A SCHEDULE showing how "capital money" arising under the Settled Land Act may be invested is set out in Appendix B. This it will be seen also incorporates trustee securities authorised by the Trustee Act, 1925. "Capital money arising under the Settled Land Act" is a term which will be frequently met with, and it differs from "capital money" in the ordinary sense arising under a general trust for sale.

Capital money arising under the Settled Land Act is not notionally converted into personalty, but in a certain sense it can be said to remain attached to the land from which it arose, and it follows the destination of that land: in fact it is considered as "land." Consequently in those cases where the land is allowed to remain as settled land from generation to generation the capital money, if not used in improvements on the land, will remain settled for the like period.

No vesting deed is required in respect of such capital money as in the case of the land, as the capital money is never vested in the tenant for life but remains in the names of the trustees, but if and when any additional land is purchased with any such capital money the land is conveyed to the tenant for life by what is called "a subsidiary

vesting deed," and such land then becomes subject to the same trusts as if it originally formed part of the settled land.

Any investments made with such capital money must, therefore, not be mingled with investments made under a trust for sale.

CHAPTER IX

DISCHARGE OF SETTLED LAND TRUSTEES

In view of the fact that in the case of settled land the powers of management are vested in the tenant for life or the person having the powers of a tenant for life, it may be asked "How does the trustee's office terminate?" We have already seen that where the settlement comes to an end on the death of the tenant for life the legal estate will vest in his general personal representatives, and they therefore have power to sell the property or by an assent to vest the legal estate in the property in any person becoming entitled thereto, in which case, of course, the duties of the settled land trustees would automatically terminate. The office might also be terminated by the trustees giving an assent to the person succeeding in title, and in that assent no reference is made to settled land trustees, because where an assent does not mention trustees a purchaser of property is entitled to assume that the person in whose favour the assent is given is absolutely entitled to the land.

If, however, the tenant for life should have purchased the interest of the reversioner or remainderman in the property and thereby become the absolute owner it would be necessary for the trustees to execute a Deed of Discharge. The legal estate would already be in the tenant for life, and all he would need to complete his title would be to

show that the trustees were no longer interested, and by this Deed of Discharge the trustees would declare that they were discharged from the trusts of the settlement. It will be seen, therefore, that a Deed of Discharge differs from a Deed of Release. It is not a deed showing that the trustees have been released from the trust but a deed to show that the land is free from the dominion of the trustees. It is a deed which becomes a title deed to the land, and not a certificate of release to be retained by the trustees.

If when any particular settlement terminates the land is still settled land under a subsequent or derivative settlement, the Deed of Discharge would contain evidence of this and show who were the trustees under such subsequent settlement.

According to Section 3 of the Settled Land Act, 1925, a settlement endures so long as—

(*a*) Any limitation, charge, or power of charging under the settlement subsists or is capable of being exercised; or

(*b*) The person who, if of full age, would be entitled as beneficial owner to have the land vested in him for a legal estate is an infant.

Chapter XXVI (page 155 *et seq.*) contains reference to various protective clauses for trustees in respect of settled land.

A form of a Deed of Discharge will be found in the Appendix of Forms on page 220.

CHAPTER X

UNDIVIDED SHARES

THIS has been, and still is, a subject of some difficulty, but whereas in former times—that is before 1926—the difficulty was in many cases to show the title to such shares, now the difficulty in some cases is to ascertain who are the actual trustees of the property.

Let us clearly understand what is meant by "undivided shares." If a testator by his will leaves his property to his three children in equal shares neither of these children can, as it were, put his hand on any particular portion of the property and say "This is mine," because his share is in all the property and not in any specified portion, so that if any person desired to purchase any part of the property he would have had to do so from all three. This was the cause of great confusion, difficulty, delay, and expense in some instances where property had remained in the same family for many years. A man, say, 50 years ago, may have left all his property to his seven children in equal shares. Since then one or more of them may have died leaving his or her share to several others; some may have married and settled their shares; and others may have mortgaged their shares. In all such cases it would have been necessary, before 1926, to ascertain in the case of settled shares who were the trustees of the settlements, and that such

trustees had been properly appointed, and in cases where money had been borrowed who was then entitled to the money, and if any had died intestate who had succeeded to their share as heir-at-law, and when all such persons had been ascertained it was necessary to make all such persons join in the conveyance on the sale of any portion of the property. In consequence of the trouble, time, and expense which this would often have involved many otherwise desirable transactions were rendered impracticable.

In order to remedy this state of affairs, the Law of Property Act, 1925, provides that there should no longer be any legal estate in undivided shares in land, but that the entirety should be vested in trustees who should have a trust for sale over the property. We have already seen that where there is a trust for sale over land it is not "settled land," so that in all cases where undivided shares were prior to 1926 subject to the Settled Land Acts then in existence such shares ceased to be settled land, and whilst the trustees of the settlement remained trustees of the undivided shares comprised therein, the tenant for life under such a settlement ceased to have the powers of a tenant for life, and could not dispose of the property under that Act, but the power of sale shifted to the trustees of the entirety.

Now it must be understood that undivided shares comprise land held as a tenancy in common as distinct from a joint tenancy with the right of survivorship as before pointed out. A tenancy in

common is where property is given to persons as "tenants in common," or "equally," "respectively," "share and share alike," or "among," or "between" them. A mere gift to two persons without any addition constitutes them as joint tenants, and if this joint tenancy is not separated during the joint lives the whole of the property goes to the survivor. A joint tenancy cannot be severed by will, but if either joint tenant sells his share, or mortgages or settles it, the tenancy is severed and then it is termed "an undivided share."

On the 1st January, 1926, it was natural that undivided shares were found in all sorts of conditions and states of transition which states, however, may be classified and were classified thus: (1) those which had not been divided amongst the beneficiaries but of which the entirety remained in trustees or in personal representatives who had not completed their administrative work; (2) those undivided shares which were vested in the respective owners, and (3) those which formed the subject of settlements under the Settled Land Act and were comprised in the same settlement, by which settlements it was provided that on the death of the respective tenants for life the property was to go to various persons in shares. In addition to this, some property was subject to mortgages which affected the entirety and in other cases there were mortgages which only affected undivided shares.

Provision, therefore, had to be made in all these cases, and it was accomplished in this way—

1. In this case the trustees or personal representatives (as the case might be) hold the entirety of the property free from any mortgage affecting any undivided share and also free from any mortgage on the entirety not secured by a legal mortgage upon the "statutory trusts" (a term which will be defined presently).

2. In this case, provided there were not more than four owners all of full age and neither of them had mortgaged his or her share nor settled it, the entirety of the property is held by them on the "statutory trusts."

3. In this case the trustees of the settlement hold the entirety of the property on the "statutory trusts," freed from all mortgages (other than legal mortgages on the entirety) as mentioned in (1) above.

In all cases where the above did not apply the legal estate in the entirety of the property was automatically vested in the Public Trustee. The Public Trustee, however, could take no action until he was requested to do so by the owners of more than one half in value of the entirety of the property, and provision was made for the appointment of trustees in the place of the Public Trustee as is explained in the chapter on "Appointments of Trustees."

The "statutory trusts" above referred to are thus defined by Section 35 of the Law of Property Act, 1925—

> For the purposes of this Act land held upon the "statutory trusts" shall be held upon the trusts and subject to

the provisions following, namely, upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale after payment of rates, taxes, costs of insurance, repairs, and other outgoings, upon such trusts, and subject to such powers and provisions as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land.

It must not be supposed from this that there is an immediate obligation to sell all property held in undivided shares; the object is merely to constitute trustees who will be capable of doing so when it is desired to sell. In view of the wording in the above section, it is now customary to refer to an undivided share as a "share and interest of and in the proceeds of sale and of and in the rents and profits until sale of," etc., instead of, as formerly, "a share and interest in all that property known as," etc.

An owner of an undivided share is in no way hindered from dealing with his undivided share as before, but there will always be, in whosesoever hands the shares come, the trustees of the entirety of the property, as it were, presiding over such owner. The provisions relating to undivided shares are not intended to be of a confiscatory nature nor in any way to affect the beneficial interest in property but merely to vest the nominal ownership in the persons constituted the "statutory trustees."

Unfortunately, however, it seems that all the consequences were not foreseen. It is a rule of law

that when freehold property is held upon trust for sale it is notionally "converted" into personalty, and this rule had to be applied in a case where a testator had given his freehold property to one person and his personalty to others. He held undivided shares in freehold property which were no doubt intended for the one. In consequence of the law relating to undivided shares and the "notional" conversion thereby affected it was held that the shares were personal property and must be dealt with as such.[1] A similar hardship took place in another instance[2] relating to entailed property which cannot be repeated in view of the amending Statute known as "The Law of Property (Entailed Interests) Act, 1932."

Although, as we have seen, the transitional provisions as regards undivided shares were not intended in any way to affect the beneficial interest in the property, yet it is possible these provisions may operate in such a way as to cause trouble and expense to the owners of such shares. Consequently anyone owning such shares should not regard it as a matter of indifference whether or no they are themselves trustees of the entirety or who are such trustees.

This information can probably only be obtained by inquiry from all the co-owners, as to whether any shares are subject to a mortgage or charge or have been settled in any way, and whether such mortgage, charge, or settlement existed on the 1st

[1] *Kempthorne, Re*; *Charles* v. *Kempthorne*, [1930] 1 Ch. 268.
[2] *Price, Re*, [1928] Ch. 579.

January, 1926. This may not in some cases be a pleasant task, but it is an important one, as all dealings with the entirety of the property will be affected by the position at that date. It is important to know who are the trustees because any dealings even with an undivided share will be affected. A purchaser of such a share would want to know and most probably wish to have himself appointed a trustee, and any lender on the security of an undivided share would want to know who were the trustees of the entirety so that he can give them notice of his charge.

In any case where the owner of an undivided share owns less than one half of the total property, there is a further possibility to be considered. If any share or interest in the property was mortgaged or settled on the 1st January, 1926, the legal estate will have automatically vested in the Public Trustee, but it is possible, as is pointed out in the chapter on Appointments of New Trustees, for the owners of more than one half of the entirety of the property to appoint trustees in the place of the Public Trustee, and if this is done the legal estate will vest in the trustees so appointed.

Any such trustees then have entire dominion over the disposal of the property as a whole, and, although as trustees they should consult the owners of all the shares, this is not a matter into which a purchaser need inquire, and if any owner was not consulted the entire property might be sold without his knowledge, and even whilst he was ignorant of the identity of the trustees of the property.

It is also advisable that the owner of an undivided share should know who are the trustees, so as to be able to see that the trusteeship is maintained. It has been shown that the office of trustees is that of joint tenants with the incidental feature of survivorship, and it is important to be able to ascertain how the legal estate devolves on the death of the trustees. If this is lost sight of, it might later involve an application to the Court for the appointment of trustees, and in any such case it would have to be traced back to the 1st January, 1926, to see who were on that date automatically constituted trustees. That date is an historical one in all cases where property was not in the ownership of one individual, and in all such cases care should be taken to ascertain the true position whilst the facts are at hand.

There have been several decisions on the interpretation of these provisions relating to undivided shares some of which must be briefly referred to. The first[1] decides the importance of applying the interpretation of "Part IV" (as it is commonly known) to the state of affairs *immediately before the 1st January*, 1926. In this case land had been sold to three persons as tenants in common in equal shares subject to a jointure rent charge in consequence of which, as we have before seen, it became "settled land" under the Settled Land Act, 1925. But such land was not settled land before 1926, and it was consequently held that the three persons above mentioned could make a good title to the

[1] *Ryder and Steadman's Contract, Re*, [1927] 2 Ch. 62.

land as they were the statutory trustees under Class II mentioned before. (See page 25.) If, however, the property had been conveyed to them *as joint tenants* before 1926 the property would have been settled land as the law relating to undivided shares does not affect joint tenants.[1] In the case of *Re Bird* referred to on page 37, property was held in trust for several persons on attaining 21 years of age, but as only one had attained that age it was held to be settled land, and the land would not be subject to the law relating to undivided shares until a second person had attained that age.

Then questions arose as to the position when there was more than one tenant for life under a settlement, which gave rise to the following section in the Law of Property (Amendment) Act, 1926—

> 4. Where, immediately before the commencement of this Act, there are two or more tenants for life of full age entitled under the same settlement in undivided shares, and after the cesser of all their interests in the income of the settled land, the entirety of the land is limited so as to devolve together (not in undivided shares), their interests shall, but without prejudice to any beneficial interest, be converted into a joint tenancy, and the joint tenants and the survivor of them shall, until the said cesser occurs, constitute the tenant for life for the purposes of the Settled Land Act, 1925, and this Act.

To come within this definition it has been decided that there must be a defined person to whom the property will certainly belong. In a case where

[1] *Gaul and Houlston's Contract, Re,* [1928] Ch. 689.

one of the tenants for life had power to appoint the property amongst persons, it was held that the section did not apply.[1] In another case the income was payable to a widow for life, then to the sons and daughters in equal shares with a provision for certain payments to widows of sons, and subject thereto, the property was to go to the survivor.[2] Here it was held that the section did not apply.[3]

It has been held[4] that where the land was not settled land before 1926 it is sufficient for (1) to apply if there is only one trustee though a second trustee should be appointed, but if the land becoming subject to the law relating to undivided shares was settled land before 1926, and there was only one trustee, the legal estate vests in the Public Trustee[5] as in Case III the Act provides that the vesting should be in the settled land trustees as joint tenants which is impossible where there is only one trustee.

To prevent any attempt to create a legal estate in an undivided share in land the following provision has been made by Section 34 (3) of the Law of Property Act, 1925—

> A devise bequest or testamentary appointment, coming into operation after the commencement of this Act, of land to two or more persons in undivided shares shall operate as a devise bequest or appointment of the land to the trustees (if any) of the will for the purposes of the Settled Land Act,

[1] *Colyer's Farningham Estate, Re*, [1927] 1 Ch. 677.
[2] *Barrat, Re*; *Body* v. *Barrat*, [1929] 1 Ch. 336.
[3] The reason for this decision is not intelligible to the author.
[4] *Myhill, Re*; *Hull* v. *Myhill*, [1928] 1 Ch. 100.
[5] *Price Re*; *Price* v. *Price*, [1929] 2 Ch. 400.

1925, or, if there are no such trustees, then to the personal representatives of the testator, and in each case (but without prejudice to the rights and powers of the personal representatives for purposes of administration) upon the statutory trusts hereinafter mentioned.[1]

Notwithstanding this provision it is possible for the beneficiaries to retain the property if they so desire. In that case they can call on the personal representatives, after they have finished their administrative work without having had to sell the property, to execute a vesting assent in their favour. If this is done the assent will have to express that the property is vested in the beneficiaries on trust for sale.

[1] These are the trusts set out in Section 35 (see p. 75).

CHAPTER XI

INFANTS' PROPERTY IN LAND

BEFORE 1926 an infant was capable of holding a legal estate in land, but by Section 1 (6) of the Law of Property Act, 1925, it is provided that "a legal estate is not capable of being held by an infant." When an infant was capable of holding a legal estate he could only convey it to a purchaser subject to his (the infant's) right to repudiate the transaction when he became of age or within a reasonable time thereafter. The only effective method of purchasing was (through the medium of the Settled Land Act, 1882), from trustees appointed for the infant.

To bring into force the new law of property, provision had therefore to be made for legal estates then vested in infants, either as absolute owners, or as tenants for life, or as executors or trustees. It was accordingly provided that where the legal estate was vested in an infant or infants in their own right it became settled land, but in any case of joint holders, one or more of whom was of full age, then the legal estate vested in the person or persons of full age alone. If an infant was entitled under an intestacy, it was deemed to be settled land, and the Letters of Administration were regarded as a settlement and the administrators as trustees.

Where an infant was solely entitled to the land, or held the legal estate as tenant for life, such legal

estate became vested in the trustees of the settlement under which he derived the property, but if there were no such trustees then it vested in the Public Trustee. When an infant held land as a personal representative, or trustee, or when it was vested in him as mortgagee, the legal estate also vested in the Public Trustee.

It will be seen from the chapter on "Appointments of Trustees" that the Public Trustee cannot deal with the property unless requested to do so, and that there is power for the parents of the infant and others to appoint trustees in his place.

If the Public Trustee is not requested to act and no steps are taken to appoint trustees in his place, the legal estate will automatically revest in the infant on his attaining the age of 21 years.

Section 102 of the Settled Land Act, 1925, has made provision for the management of any such land whilst vested in the trustees as follows—

(1) If and so long as any person who is entitled to a beneficial interest in possession affecting land is an infant, the trustees appointed for this purpose by the settlement, or if there are none so appointed, then the trustees of the settlement, unless the settlement or the order of the Court whereby they or their predecessors in office were appointed to be such trustees expressly provides to the contrary, or if there are none, then any persons appointed as trustees for this purpose by the Court on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land on behalf of the infant, and in every such case the subsequent provisions of this section shall apply.

(2) The trustees shall manage or superintend the management of the land, with full power—

(*a*) to fell timber or cut underwood from time to time in the usual course for sale, or for repairs or otherwise; and

(*b*) to erect, pull down, rebuild, and repair houses, and other buildings and erections; and

(*c*) to continue the working of mines, minerals, and quarries which have been usually worked: and

(*d*) to drain or otherwise improve the land or any part thereof: and

(*e*) to insure against loss by fire; and

(*f*) to make allowances to and arrangements with tenants and others; and

(*g*) to determine tenancies, and to accept surrenders of leases and tenancies; and

(*h*) generally to deal with the land in a proper and due course of management;

but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

(3) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

(4) This section has effect subject to an express appointment by the settlement, or the court, of trustees for the purposes of this section or of any enactment replaced by this section.

(5) Where any person is contingently entitled to land, this section shall, subject to any prior interests or charges affecting that land, apply until his interest vests, or, if his interest vests during his minority, until he attains the age of 21 years.

This subsection applies only where a person becomes contingently entitled under an instrument coming into operation after the commencement of this Act.

(6) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, under which the interest of the infant or person contingently

entitled as aforesaid arises, and has effect subject to the terms of that instrument and to the provisions therein contained.

Section 51 (3) of the Administration of Estates Act, 1925, contains a very important provision regarding the property of infants who die under age, the purport of which was not fully recognised. This is the subsection—

> Where an infant dies after the commencement of this Act without having been married, and independently of this section he would, at his death, have been equitably entitled under a settlement (including a will) to a vested estate in fee simple or absolute interest in freehold land, or in any property settled to devolve therewith or as freehold land, such infant shall be deemed to have had an entailed interest, and the settlement shall be construed accordingly.

Prior to 1926, if an infant died under age and unmarried, the property of the infant would go to his father under the old law of intestacy, but the effect of this subsection is that the property never vests in the infant, and in the event of his death unmarried whilst an infant the property will go to the person entitled under any other limitation created by the deed or settlement under which the property is derived, or it would revert to the settlor. This view was much criticised at the time, but the view advanced is certainly borne out by a recent case in which a person died in 1925 intestate seised of real property and leaving a widow and three infant children. The eldest child died in 1930 still an infant, and it was held that the above-mentioned subsection applied, and that as the heir had died under age his fee simple estate was cut down to

an entail and the reversion devolved on the next eldest son as under the old law, and that that son would only have an entailed interest until he attains the age of 21 years when his estate will become absolute.[1]

It has to be remembered that an infant cannot execute a deed of disentail nor can he make a will, consequently the position must be as stated above.

[1] *Re Taylor*; *Pullan* v. *Taylor*, [1931] 2 Ch. 242.

CHAPTER XII

PROPERTY PASSING UNDER WILLS OR ON INTESTACY AND ASSENTS

In the case of all real property (which for the purposes of the Administration of Estates Act, 1925, includes leaseholds) a fiduciary position arises on the death of the owner. Even in the case of a simple will devising or bequeathing all property to a single person and appointing such person the sole executor, that person is not entitled to assume the beneficial ownership of such property without first discharging all funeral and testamentary expenses and debts. The property first vests in him (or her) as executor (or executrix), and as soon as the administrative work has been completed there should be an "Assent" by such person in his (or her) own favour.

Whilst the importance and absolute necessity of an assent is unquestionably accepted as the only means of passing the legal estate to another person, it has been rather frequently stated that there is no need for an assent where an executor is also beneficially entitled.

This is a view to which the author cannot subscribe because it seems the object of an assent is two-fold. It is essential to pass a legal estate from an executor to the person entitled, but it is also, it is submitted, of equal importance as evidencing the completion of the work of administration. The

new legislation has provided that in the case of land no title need be shown to the beneficial interest, but that all dealings therewith should be with the person holding the legal estate, and also that a will is to take effect in equity and is not to be regarded as a document of title to a legal estate in land. The probate is to be the evidence of title of the executor, and letters of administration the evidence of title of an administrator. Beyond this point the title must be evidenced by an assent under which a purchaser or other person dealing with the legal estate receives full protection. Section 36 of the Administration of Estates Act, 1925, is one of the most important sections of all the mass of legislation contained in the Acts of 1925. That section is set out in full later in this chapter.

The importance of having an assent has been illustrated by two cases. It has been held in the case of an administration that when the estate has been fully administered the administrators become trustees under Section 33 of the Administration of Estates Act, 1925, and should assent under Section 36 to the estate vesting in themselves as trustees, and further that if one of the administrators die before this has been done an application must be made to the Court to appoint another personal representative.[1] Where trustees had obtained probate of a tenant for life's will and applied to the Court whether they should take out a special grant in respect of the land vested in the tenant for life, and then subject to a trust for

[1] *Re Yerburgh*; *Yerburgh* v. *Yerburgh*, [1928] W.N. 208.

sale in favour of the trustees, it was held they should execute a vesting assent in their own favour as such trustees.[1]

In the author's opinion, the execution of a vesting assent should be looked upon as a *sine qua non* in the administration of every estate containing real or leasehold property, and there seems to be only one instance in which a delay in executing such an assent can be reasonably regarded as justifiable. This instance is where an estate is left to a husband or wife for life and then to the child or children and the husband or wife is appointed the sole executor or executrix of the will.

In this case, seeing that on the death of the life tenant the settlement comes to an end it may be that a vesting assent prepared on the original testator's death would eventually prove to be of no purpose.

If a sale was immediately desired, the executor could sell as personal representative, but in order to give an effective vesting assent there would have to be an appointment of two trustees for the purposes of the Settled Land Act, and then if the property was retained these trustees would have no duties to perform, and as the settlement would terminate on the death of the tenant for life they would not be entitled to take out any special grant in respect of the property.

It seems that full justification for the delay or omission to execute a vesting assent in this case can be found in Section 39 of the Administration

[1] *Re Cugny's Will Trusts*; *Smith* v. *Freeman*, [1931] 1 Ch. 305.

of Estates Act, 1925, which provides that the powers of a personal representative are "during a minority of any beneficiary *or the subsistence of any life interest* or until the period of distribution arrives."

VESTING ASSENTS

Section 36 of the Administration of Estates Act, 1925, provides—

(1) A personal representative may assent to the vesting, in any person who (whether by devise, bequest, devolution, appropriation or otherwise) may be entitled thereto, either beneficially or as a trustee or personal representative, of any estate or interest in real estate to which the testator or intestate was entitled or over which he exercised a general power of appointment by his will, including the statutory power to dispose of entailed interests, and which devolved upon the personal representative.

(2) The assent shall operate to vest in that person the estate or interest to which the assent relates, and, unless a contrary intention appears, the assent shall relate back to the death of the deceased.

(3) The statutory covenants implied by a person being expressed to convey as personal representative, may be implied in an assent in like manner as in a conveyance by deed.

(4) An assent to the vesting of a legal estate shall be in writing, signed by the personal representative, and shall name the person in whose favour it is given and shall operate to vest in that person the legal estate to which it relates; and an assent not in writing or not in favour of a named person shall not be effectual to pass a legal estate.

(5) Any person in whose favour an assent or conveyance of a legal estate is made by a personal representative may require that notice of the assent or conveyance be written or endorsed on or permanently annexed to the probate or letters of administration, at the cost of the estate of the deceased, and that the probate or letters of administration be produced, at the like cost, to prove that the notice has been placed thereon or annexed thereto.

(6) A statement in writing by a personal representative that he has not given or made an assent or conveyance in respect of a legal estate, shall, in favour of a purchaser, but without prejudice to any previous disposition made in favour of another purchaser deriving title mediately or immediately under the personal representative, be sufficient evidence that an assent or conveyance has not been given or made in respect of the legal estate to which the statement relates, unless notice of a previous assent or conveyance affecting that estate has been placed on or annexed to the probate or administration.

A conveyance by a personal representative of a legal estate to a purchaser accepted on the faith of such a statement shall (without prejudice as aforesaid and unless notice of a previous assent or conveyance affecting that estate has been placed on or annexed to the probate or administration) operate to transfer or create the legal estate expressed to be conveyed in like manner as if no previous assent or conveyance had been made by the personal representative.

A personal representative making a false statement, in regard to any such matter, shall be liable in like manner as if the statement had been contained in a statutory declaration.

(7) An assent or conveyance by a personal representative in respect of a legal estate shall, in favour of a purchaser, unless notice of a previous assent or conveyance affecting that legal estate has been placed on or annexed to the probate or administration, be taken as sufficient evidence that the person in whose favour the assent or conveyance is given or made is the person entitled to have the legal estate conveyed to him, and upon the proper trusts, if any, but shall not otherwise prejudicially affect the claim of any person rightfully entitled to the estate vested or conveyed or any charge thereon.

(8) A conveyance of a legal estate by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral, and testamentary or administration expenses, duties, and legacies of the deceased have been discharged or provided for.

(9) An assent or conveyance given or made by a personal representative shall not, except in favour of a purchaser of

a legal estate, prejudice the right of the personal representative or any other person to recover the estate or interest to which the assent or conveyance relates, or to be indemnified out of such estate or interest against any duties, debt, or liability to which such estate or interest would have been subject if there had not been any assent or conveyance.

(10) A personal representative may, as a condition of giving an assent or making a conveyance, require security for the discharge of any such duties, debt, or liability, but shall not be entitled to postpone the giving of an assent merely by reason of the subsistence of any such duties, debt or liability if reasonable arrangements have been made for discharging the same; and an assent may be given subject to any legal estate or charge by way of legal mortgage.

(11) This section shall not operate to impose any stamp duty in respect of an assent, and in this section "purchaser" means a purchaser for money or money's worth.

(12) This section applies to assents and conveyances made after the commencement of this Act, whether the testator or intestate died before or after such commencement.

Form of Vesting Assent where Land Vests in a Beneficiary Absolutely

[*Note.* Where property is given to any person the executor will clear the death duty and after payment of all debts, funeral, and testamentary expenses then vest the property in the person entitled by an assent in the following form.]

I, A. B. of etc. as the Personal Representative of C. D. late of etc. who died on the day of 19 and Probate of whose Will was granted to me on the day of 19 by the Probate Registry do this day of 19 as personal representative hereby assent to the vesting in E. F. of etc. of ALL THAT (describe the property) for an estate in fee simple (or, if the property is leasehold, state "for all the estate and interest therein of the said C. D. at the time of his death") AND I hereby acknowledge the right of the said E.F. to the production of the said Probate and to delivery of copies thereof.

AS WITNESS my hand the day and year above written.

(This document needs no stamp duty.)

In the case of an intestacy a similar assent will be given by the administrator referring to "Letters of Administration" instead of "Probate of the Will."

FORM OF ASSENT IN THE CASE OF SETTLED LAND

1. WE, A. B. of etc. and C. D. of etc. as the Personal Representatives of E. F. late of etc. who died on the day of 19 and Probate of whose Will limited to settled land was granted to us on the day of 19 by the Probate Registry hereby as personal representatives assent to the vesting in G. H. of etc. of ALL THAT etc. for an estate in fee simple (or, if leasehold, "for all the estate and interest therein of the said E. F. at the time of his death") AND we hereby acknowledge the right of the said G. H. to production of the said Probate and to delivery of copies thereof.

2. The premises are vested in the said G. H. upon the trusts declared of and concerning the same by a settlement dated etc. and made between etc.

3. WE the said A. B. and C. D. are the trustees of the Settlement for the purposes of the Settled Land Act, 1925.

4. The power of appointing new Trustees of the settlement is vested in the said G. H. during his life (If this is not so: "The statutory power of appointing trustees applies to the settlement").

AS WITNESS our hands the day and year above written.

(This document requires no stamp duty.)

PART II

PERSONAL PROPERTY AND GENERAL TRUST LAW

CHAPTER XIII

PERSONALTY SETTLEMENTS

THE kinds of trusts which it is now proposed to consider are those arising under a settlement made in contemplation of marriage, those arising under wills, and those which arise under the law of intestacy. It will be noticed that a settlement is usually and properly made in contemplation of marriage because if the marriage first took place, the settlement would be regarded as a voluntary settlement, that is, a settlement in the nature of a Deed of Gift and without adequate consideration. In the eyes of the law marriage is considered as "valuable consideration" in the same light as the payment of purchase money on a sale is valuable consideration. A voluntary settlement is liable to be upset by the Bankruptcy Laws, and it also renders the deed liable to stamp duty at the rate of £1 per cent instead of 5s. per cent.

The settlement is effected by transferring securities into the names of named persons who are termed the "trustees" or by the payment over of a sum of money to be invested by those trustees. Sometimes a policy of assurance on the life of the

settlor is assigned to the trustees in which case the settlor enters into a covenant to keep up the policy. The settlement may also contain an assignment of the settlor's reversionary interest in property, and it may also contain provisions for the inclusion of property to be subsequently acquired by the proposed wife.

Whenever securities are transferred or a sum of money is handed over for investment the trustees must satisfy themselves that the securities transferred to them or those in which the money is invested by them come within the range of investments authorised by the settlement, or if the settlement does not contain any directions on this point they should see that the investments come within the range of those authorised by the Trustee Act, 1925. A schedule of the investments authorised by this Act is set out in Appendix C.

Having regard to the extensive nature of this schedule it is becoming less usual for a settlement to contain any lengthy investment clause. Where the settlor is, however, a commercial man or has any great interest in any industrial concern it may be that he will wish the trust funds to be invested in that industry, and in that case there should be a power inserted in the settlement enabling the trustees to retain any such property or investments, or to invest in the stocks and shares of such industry, notwithstanding the fact that they are not authorised trustee investments.

It is provided by Sections 3 and 4 of the Trustee Act, 1925, that the powers of investment shall be

exercised according to the discretion of the trustees, and also that a trustee shall not be held liable for a breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the trust deed or by the general law. It has been suggested that the word "only" implies an obligation on the part of a trustee to "keep an eye" on the trust investments. Where these are numerous it is a custom with some trustees to have a periodical report on them by some stockbroker. This can generally be done at a small fee especially in cases where there is an understanding that any variation of securities will be entrusted to such stockbroker.

It may be a little difficult at times for a trustee to determine exactly whether a particular security comes within the scope of the authorised trust investments, but the stock lists issued by stockbrokers usually indicate by some distinguishing mark those which are trust securities, and the stockbroker or the trustees' banker would always advise on any point of doubt.

Until the Trustee Act, 1925, a trustee was by law forbidden to invest in any securities payable to bearer, and these securities were also generally expressly forbidden in a settlement. But a trustee may now, in the absence of any direction to the contrary in his trust deed, invest in any such securities if they otherwise come within the description of authorised trust investments, and provided the securities are lodged for safe custody and collection of income with a banker. In such a case the trustee

is not liable for any loss, and if the banker makes a charge for the safe custody—which is seldom done when the account is kept at the bank—the trustee may pay the charge out of income. (See Trustee Act, 1925, Section 7.)

In making his investments the trustee must act fairly and impartially. He should not prejudice the tenant for life by unduly and unreasonably selling an investment just before a dividend accrues due, nor, on the other hand, should he make it a habit of buying new stocks just before a dividend is declared so as to enhance the income of the tenant for life, at the expense of the trust estate. It should be mentioned that although a dividend or interest has nearly accrued due at the date of purchase the whole of such dividend or interest must be regarded as income, and go to the tenant for life and, on the other hand, if a sale is made at a time when the dividend or interest is about to be declared all the proceeds must be regarded as capital, and the tenant for life will not be entitled to any proportion for income.

By Section 11 of the Trustee Act, 1925, trustees are empowered to apply capital money in payment of calls on shares subject to the trust, and this section also provides that a trustee, pending the negotiation and preparation of any mortgage or charge, or during any other time while an investment is being sought, may pay any trust money into a bank to a deposit or other account, but all interest, if any, payable in respect thereof must be applied as income.

The subject of investments on mortgage is dealt with under a separate heading (see page 104).

The trusts of a marriage settlement are usually, in the first place, to hold the trust funds in trust for the settlor until the marriage so as to provide for the possible contingency of the marriage not taking place. The usual trusts are then, as to the property settled by the husband, upon trust to pay the income to him during his life, and, as to the property settled by or on behalf of the wife, upon trust to pay the income to her during her life "without power of anticipation." On the death of either spouse there is usually a trust to pay the income to the survivor during his or her life.

It may sometimes be thought desirable to protect the life interests thus conferred against undesirable alienation by the beneficiary, and this can be done by creating a "protective trust" (see page 108).

The settlement then goes on to state what is to become of the settled property after the death of both contracting parties. This is usually provided by a trust that on the death of the survivor of the husband and wife the trust funds are to be held in trust for the child or children of the marriage at such age or time ages or times not earlier than the age of 21 years, or, in the case of females, the time of marriage, and in such shares (if more than one child) as the husband and wife shall by any deed or deeds jointly appoint or as the survivor shall by deed or by will or codicil appoint, and in default of any such appointment then in trust for the children

of the marriage in equal shares, sons to take at 21 and daughters at 21 or on marriage under that age. There is also usually a provision requiring children to bring into hotchpot any shares appointed to them. (See page 113 as to "Hotchpot".)

If there are no children of the marriage it is usually provided that the property settled by the husband shall revert to him absolutely, and that the property settled by the wife shall be held in trust for her absolutely or, alternatively, upon such trusts as she shall during coverture by deed or will appoint, and in default, upon trust for her absolutely if she shall survive her husband, but if she should die before him, then, subject to the husband's life interest, upon trust for the person or persons who, under the statutes for the distribution of the estates of intestates, would, on her decease, have been entitled thereto if she had died possessed thereof intestate, and without leaving a husband or issue surviving, such persons, if more than one, to take as tenants in common in the shares appointed by the statutes relating to the distribution of the estates of intestates. This variation in the trusts of the wife's property is to prevent it accruing to the husband's estate, but in view of the altered law of intestacy in consequence of which the husband's right of succession has been cut down, it will now probably be more usual to give the reversion to the wife, as in the case of the husband, absolutely.

The power of appointment given to a husband and wife in a marriage settlement is a very useful

weapon for protecting the interests of the issue of the marriage. It acts as a preventative to the temptation which sometimes exists to sell the reversionary interest at an inadequate price to gratify some immediate desire, for whilst the power remains over the fund no child is absolutely sure of any share or interest in the trust funds and is, therefore, unable to offer a satisfactory title to a would-be purchaser or mortgagee. The power is also useful in cases where it is desired to assist any particular child needing more help than others, for it enables the parents to appoint to such child a larger share in the trust funds. Under such a power even the whole of the property could be appointed to one child only.

Section 158 of the Law of Property Act, 1925, has provided that any appointment, whether made before or after the Act, under a power to appoint any property among two or more persons shall not be invalid on the ground that (*a*) an unsubstantial, illusory or nominal share only is appointed to or left unappointed to devolve upon any one or more of the objects of the power, or (*b*) any object of the power is thereby altogether excluded; but every such appointment shall be valid notwithstanding any one or more of the objects is not thereby, or in default of appointment, to take any share in the property. There may, however, be provisions inserted in the settlement to nullify or modify this statutory provision and to ensure that all the objects are to receive some portion of the trust funds.

This power of appointment is termed a "special power" to distinguish it from a "general" power, that is, a power to appoint to anyone (such as is often contained in a settlement), in default of issue of the marriage, and to provide for the ultimate destination of the trust funds. A general power is practically equivalent to actual ownership, for if a person has such a power which is immediately exercisable he or she may appoint the property to himself or herself and request the trustees to transfer it to him or her.

It is important to distinguish between the two kinds of powers, because of the operation of the rule against perpetuities. This rule is that every limitation of property is void by which the vesting of an estate in fee simple in the case of freehold property, or an absolute interest in the case of personal property, is, or may possibly be, postponed for a longer period than that comprised by a life or lives in being at the date when the limitation comes into operation, and twenty-one years afterwards, provided that the property may then vest in a child *en ventre sa mere*.

In the case of a "special" power of appointment the time allowed by the rule runs from the creation of the power, that is to say, in the case of a settlement, the date of the settlement. Consequently the person exercising a special power must do it in such a way as the settlor himself or herself could have done at the time when the settlement was executed.

The reason why real property may be held under a settlement for a longer period and not be affected by the rule is that a tenant in tail on attaining the age of 21 can always end a settlement by the execution of a disentailing deed.

CHAPTER XIV

INVESTMENTS ON MORTGAGE

In lending money on mortgage of freehold property a valuer's report should always be obtained. In the absence of any enlarged power conferred on them by the trust deed trustees must not lend on leasehold property unless there is at least 200 years to run, and provided the rent reserved is also not greater than one shilling, and that there is no right of redemption or condition for re-entry except for non-payment of rent. A trustee may invest on any charge or upon mortgage of any charge made under the Improvement of Land Act, 1864 (see Section 5 (1) of the Trustee Act, 1925.)

A trustee must not lend on personal security unless authorised to do so by his trust deed, nor must he lend on second mortgage because of the possibility of foreclosure proceedings by the first mortgagee[1]; nor must he lend on a contributory mortgage as he could not call in the mortgage if the other contributories did not agree.[2] A trustee may, however, lend on a submortgage as he would then be practically in the same position as a first mortgagee.

The following conditions must be observed when advancing trust funds on mortgage—

[1] *Morris* v. *Wright* (1852), 14 Beav. 38; *Lockhart* v. *Reilly* (1857), 1 De G. and J. 476.

[2] *Webb* v. *Jonas* (1888), 39 Ch. D. 660; *Re Massingberd*; *Clark* v. *Trelawney* (1890), 63 L.T. 296; *Stokes* v. *Prance*, [1898] 1 Ch. 212.

1. There must be a report as to value by a practical surveyor or valuer instructed and employed independently of the owner of the property.

2. The advance must not exceed two-thirds of the value as stated in the report.

3. It must be shown that the loan was made under the advice of the surveyor or valuer named in the report.

To comply with these conditions the report should be somewhat in the following form—

Date

To Messrs. A. B. of etc. and C. D. of etc. the trustees of etc.

Gentlemen,

I hereby certify that I have on your instructions inspected the property known as Whiteacre which consists of (here may follow any description and remarks the Surveyor may think desirable).

I value the said property in the sum of £5,000 and I consider the property forms a good trustee investment for the sum of £3,000.

[This report is given on the understanding that the property is freehold and has a good marketable title and that there are no unusual restrictions or conditions affecting the same].

Yours faithfully,

Surveyor and Valuer.

It is stipulated that the surveyor or valuer need not carry on business in the locality where the property is situate, but there are obvious advantages in employing one with local knowledge.

Mortgages are frequently preferred, because if precaution is taken to obtain a good valuation

which shows a reliable margin the trust fund escapes the fluctuations of the Stock Exchange and all the costs and expenses of a mortgage (including the valuer's fee) are borne by the borrower.

Section 9 of the Trustee Act provides that if a trustee improperly advances trust money on a mortgage security which would at the time of investment be a proper investment in all respects for a smaller sum than is actually advanced thereon the security shall be deemed an authorised investment for such smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof, with interest.

Under Section 10 of the same Act a trustee may agree that money may remain on mortgage for a period not exceeding seven years, provided interest is paid within thirty days of the date appointed for payment, and there is no breach of any of the mortgage covenants. It is also provided that on a sale by trustees or a tenant for life of any of the trust property it may be subject to a condition that any part of the purchase money, not exceeding two-thirds thereof, may remain on mortgage and in this case the trustees may dispense with a report and valuation. Such a mortgage must be secured by a legal charge by way of mortgage or a mortgage by demise, and must contain a covenant by the mortgagor to keep any buildings on the property insured to the full value thereof.

By virtue of Section 73 (1) (xviii) of the Settled Land Act, 1925, where land is being laid out for building purposes, capital money may be used in

financing any person who may have agreed to take a lease or grant for building purposes of the settled land, or any part thereof, by making advances to him in the usual manner on the security of an equitable mortgage of his building agreement.

CHAPTER XV

PROTECTIVE TRUSTS

SECTION 33 of the Trustee Act, 1925, which creates protective trusts, applies to settlements coming into operation on or after the 1st January, 1926, and may be subject to variation by the terms of the trust deed. The effect is that where the income of property, or an annuity or other periodical payment, is directed to be held on protective trusts for a beneficiary for the period of his life or any less period, then during that period the trust will be for the beneficiary until he does, or attempts to do, or suffers any act or thing, or until some event happens, whereby he would be deprived of the income or any part thereof; and from that time the income is to be held by the trustees upon trust to apply the same for the maintenance or support or otherwise for the benefit of all or any one or more exclusively of the following persons, viz. the beneficiary and his or her wife or husband (if any) and his or her children or remoter issue (if any); but if there is no husband, wife, or children, then upon trust for the beneficiary and the person who becomes entitled on his or her death or other the end of the trust period, as the trustees in their absolute discretion, without being liable to account for the exercise of such discretion, think fit.

But nothing in this section is to validate any

trust which would, if contained in the instrument creating the trust, be liable to be set aside.

The main object of this is, presumably, to prevent any fraud against the bankruptcy laws. It has been held that a man cannot settle his own property so as to take an interest determinable on bankruptcy [1] unless the property comes from some other person (including his wife).[2] To make such a provision the first life interest must be given to the wife or there must be a discretionary trust. A man may settle his property in such a way that his interest may determine on alienation, but the interest of the man must then cease, and some provision must be made for the payment of the income during the rest of his life.[3] When a life interest in a man's property is settled on himself until his bankruptcy, if he become bankrupt the life interest vests in his trustee in bankruptcy without fail.

It has been held that a covenant to settle after-acquired property does not affect the case of a protected life interest, as if the covenantor had to transfer the interest to trustees the effect of the covenant would be to destroy the interest and there would be nothing to transfer.[4]

Where a testator, in exercise of a power of appointment among his children and issue conferred on him by his marriage settlement (made in

[1] *Higginbotham* v. *Holme* (1811), 19 Ves. 88.
[2] *Ex parte Cook* (1803), 8 Ves. 353.
[3] *Brooke* v. *Pearson* (1859), 27 Beav. 181; *Re Perkins*, [1912] W.N. 99.
[4] *Re Smith*; *Franklin* v. *Smith*, [1928] Ch. 10.

1884), directed the trustees to hold the income on protective trusts for the benefit of his son, born after 1884, and subject thereto on trust for the son's daughter, it was held that the appointment did not create a perpetuity, but that the wife not being an object of the power the protective trusts must be eliminated.[1]

[1] *Re Boulton's Settlement Trust; Stewart* v. *Boulton*, [1928] Ch. 703.

CHAPTER XVI

POWERS OF ADVANCEMENT

SECTION 32 of the Trustee Act, 1925, confers on trustees a power to advance capital. These are the conditions: The advancement may be of any part not exceeding one-half of the total amount of the presumptive or vested share of the beneficiary and for the advancement or benefit of such beneficiary, and may be made in such manner as the trustees in their absolute discretion think fit. The power is not confined to cases of infants or minors. If the beneficiary is only entitled to a share of the total fund, he must account for any such advances made to him when the fund is distributed. The power is applicable notwithstanding that there may be a power of appointment over the property, and although it is possible there may be an increase in the number of persons to share ultimately in the trust funds.

If the property is subject to any prior life or other interest, the consent in writing of the person enjoying such prior interest must be obtained.

The power does not extend to property subject to the Settled Land Act—i.e. held on strict settlement—but only to property held on trust for sale and, of course, personal property.

The power is applicable only in the case of trusts which came into operation on or after the 1st January, 1926, and in the case of these trusts it

will be implied unless there is a contrary intention or a negation of the power expressed in the settlement or trust deed.

Trustees of a will holding land upon trust for sale where the proceeds of sale are not subject to any trust for reconversion under the will (i.e. where there is no trust to purchase land with such proceeds) are entitled to exercise this power of advancement in favour of a remainderman, subject to the consent of the tenant for life, whose life interest is protected against assignment.[1]

[1] *Re Stimpson's Trusts ; Stimpson* v. *Stimpson,* [1931] 2 Ch. 77.

CHAPTER XVII

HOTCHPOT

A TRUSTEE must always consult the settlement or will constituting the trust to see whether it contains any provision that any advances made to a beneficiary are accountable for by him on the division of the trust fund. It is frequently expressed in words similar to these: "Provided always that no child to whom any share shall be appointed shall take any share in the unappointed part of the trust funds without bringing the share or shares appointed to him or her into hotchpot and accounting for the same accordingly." Such a provision must be expressed; it will not be implied in a settlement.[1]

The question of hotchpot, however, arises in the case of an intestacy, whether it be a total intestacy or a partial intestacy. In the case of a total intestacy, Section 47 (1) (iii) of the Administration of Estates Act, 1925, provides—

> Where the property held on the statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child or the share which

[1] *Re Alfreton* (1883), 52 L.J. 745; *Re Bacon* (1889), 42 Ch. D. 559.

such child would have taken if living at the death of the intestate, and shall be brought into account, at a valuation (the value to be reckoned as at the death of the intestate), in accordance with the requirements of the personal representatives.

In the case of a partial intestacy, Section 49 (*a*) of the same Act provides that subject to any provision expressed in the will of the deceased—

> The requirements as to bringing property into account shall apply to any beneficial interests acquired by any issue of the deceased under the will of the deceased, but not to beneficial interests so acquired by any other persons.

It is to be noticed that in the case of total intestacy the advances to be accounted for are those made to any "child," but in the case of partial intestacy the word "issue" is used.

Where under a will the issue of a deceased child take the share of their deceased parent it seems to be rather unsettled as to whether such issue are liable to bring into account any advances made to their parent by the testator.[1] It has, however, recently been decided that a debt owing to a testator's estate from his deceased child cannot be deducted against any share passing to the issue of such deceased child.[2]

[1] *Re Scott*, [1903] 1 Ch. 1; *Re Binns; Public Trustee* v. *Ingle*, [1929] 1 Ch. 677: *Rose* v. *Rogers* (1870), 39 L.J. Ch. 791; *Hewitt* v. *Jardine* (1872), 14 Eq. 1467.

[2] *Re Binns; Public Trustee* v. *Ingle*, [1929] 1 Ch. 677.

CHAPTER XVIII

MAINTENANCE

By Section 31 of the Trustee Act, 1925, the law as to the advancement of income for maintenance has been considerably modified and enlarged, but this is only to take effect in the case of trusts coming into existence on or after the 1st January, 1926. Section 43 of the Conveyancing Act, 1881, applies to trusts which existed before that date. Under either section, in the absence of any contrary direction in the trust instrument, trustees holding property in trust for an infant, can, at their sole discretion, pay or apply the whole or any part of the income to the parent or guardian or otherwise apply it for the maintenance, education or benefit of the infant, whether or not there is any other fund available for the purpose or anyone by law bound to provide for the infant. The earlier law applies to contingent interests only if the contingency is the attainment of the age of 21 years or the occurrence of some event before, but the new law extends to any property held in trust for any person for any interest whatsoever, whether vested or contingent. It is not limited to infancy or a minority.

Other conditions attached by the new law are that, if the infant attains majority, even though his interest may not then vest, the trustees shall thenceforth pay the income to him until he attains

a vested interest or dies, or until failure of his interest. The power is to apply in the case of a contingent interest only if the trust carries the intermediate income, but it will apply to a future or contingent legacy by a parent or one in *loco parentis* to the legatee if and for such period as under the general law the legacy would carry interest, and such interest is to be at the rate of 5 per cent if the income is sufficient.

With regard to the general law above referred to the following cases have been decided—

Re Dickson; *Hill* v. *Grant* (1885), 29 Ch. D. 331; *Re Eyre*, [1917] 1 Ch. 351—Income under Section 43 of the Conveyancing Act, 1881, cannot be used for maintenance unless, should the contingency happen, the intermediate income will go with the capital.

Re Boulter, [1918] 2 Ch. 40—It is not necessary that the infant should be absolutely entitled to the arrears of income on attaining 21. The section applies even though he only has a contingent life interest, provided the income will vest with the capital.

Re Holford, [1894] 3 Ch. 30—The section applies where property is limited to a class on attaining 21, and, in the case of personalty, even though some member of the class may have attained 21; so income derived from the shares of children still under age can be applied for their maintenance and does not belong to the one who has attained 21.

Re Averill; *Salisbury* v. *Buckle*, [1898] 1 Ch. 523; *Re Stevens*, [1915] 1 Ch. 429—Where *realty* is devised to a class contingently on attaining 21, the whole interest vests in the first devisee who attains that age and he takes the whole of the income until another share vests.

There are also other conditions affecting this power which did not appear in the earlier Act. Section 31 of the Trustee Act, 1925, says the advance may be made of the whole or such part

"as may, in all the circumstances, be reasonable." And in the exercise of their discretion the trustees are bidden to have regard to the age of the infant and his requirements, and generally to the circumstances of the case, and, in particular, to what other income, if any, is applicable for the same purposes; and where trustees have notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid and applied, or the Court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.

The primary object of this is, no doubt, that where the gift is from a person other than one in *loco parentis*, such person may not escape his legal liability; and, where there are several funds, that one contingent remainderman may not be unduly prejudiced in the event of his succeeding to the fund where all the income has been so applied, whilst another might get his fund with the accumulated income which had not been so applied.

During an infancy, the trustees are to accumulate any income not advanced at compound interest by investing it and the resulting income in authorised investments.

Any accumulations of income may be applied as income for the current year.

When the person who had a vested interest during infancy, or until marriage, in the income, attains 21 years of age or marries, or when, on attaining that age or marrying after that age, such person

becomes entitled to the property itself in fee simple or absolutely or for an entailed interest, the trustees must hold the accumulations in trust for such person absolutely, but without prejudice to any settlement made by him. After marriage, the receipt of an infant will be a good discharge for the same.

In any other case the trustees shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accretions arose, and if such property is settled land, such accretions must be regarded as capital money arising under the Settled Land Act.

In *Re Maber ; Ward* v. *Maber*, [1928] Ch. 88, where income of residuary personalty had been directed to be accumulated for twenty-one years after the testator's death for the benefit of the children of A who should attain 21, and where A had two children born within the twenty-one years, a question arose as to whether there was an intestacy from the end of the twenty-one years as regards income not applied for maintenance of infant children, and it was held there was no intestacy if one of the children eventually attains 21, as by Section 165 of the Law of Property Act, 1925, the years of minority accumulation are not to be counted in the twenty-one year period allowed for accumulation.

In *Re Raine ; Tyerman* v. *Stansfield*, [1929] 1 Ch. 716 it was held that a pecuniary legacy

bequeathed to an infant contingently on his attaining 21 does not carry the intermediate income unless the testator is in *loco parentis* to the infant and there is no direction to appropriate funds for payment of the legacy, and no indication of an intention that the income is to be used for maintenance. Section 175 of the Law of Property Act, 1925, does not apply to such a legacy nor Section 31 of the Trustee Act, 1925.

CHAPTER XIX

APPOINTMENTS OF NEW TRUSTEES

BEFORE proceeding with the appointment of new trustees the will or settlement should always be referred to, as it frequently names the persons who are to have the power of appointing trustees, and any appointment made contrary to any direction of such will or settlement would be invalid, with the result that any persons dealing with the trustees purported to be so appointed would not be able to get a valid discharge for any money paid to them or to obtain a good title from them.

The appointment of trustees is governed by Sections 34 to 40 of the Trustee Act, 1925, and by Section 65 of the same Act it is provided that all the powers and provisions contained in the Act with reference to the appointment of new trustees apply to and include trustees for the purposes of the Settled Land Act, 1925.

Section 34 of the Act provides that where at the commencement of the Act there were more than four trustees of a settlement of land no new trustee shall be capable of being appointed until the number of trustees is reduced to less than four, and that the number shall not be increased beyond four. If, however, more than four trustees are named in the settlement the first four alone shall be the trustees, and the other persons named shall not be trustees unless appointed on the occurrence

of a vacancy. This provision, however, does not apply to land vested in trustees for charitable, ecclesiastical, or public purposes.

Section 36 of the Act provides that where a trustee, either original or substituted, and whether appointed by the Court or otherwise, is dead, remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses, or is unfit to act therein, or is an infant, then:

(*a*) the person or persons named for the purpose of appointing new trustees by the instrument, if any, creating the trust, or,

(*b*) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee

may by writing appoint one or more other persons (whether or not being the persons exercising the power) to be the trustee or trustees in the place of the trustee so deceased, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable or being an infant as aforesaid.

A sole or last surviving executor intending to renounce shall have and shall be deemed always to have had power at any time before renouncing Probate to exercise the power of appointment given by Section 36 or by any similar enactment, if willing to act for that purpose and without thereby accepting the office of executor.

Additional trustees may be appointed at any

time, although no vacancy has occurred, provided the number does not exceed four.

The section also applies in the case of a trustee nominated in a will who dies before the testator and the provisions of the section relating to a continuing trustee include a refusing or retiring trustee if willing to act in the execution of the provisions of the Act.

A trustee cannot retire without appointing a fresh trustee if by reason of his retirement there would be a single trustee, unless such single trustee be a Trust Corporation.

On the appointment of a new trustee, or in case of a Deed of Retirement, there will always (unless expressly excluded) be an implied vesting declaration in respect of the trust property. This, however, will not be effectual to pass the legal estate in any mortgage property, which must be effected by a transfer of the mortgage in like manner as all stocks and shares representing the trust funds will have to be transferred by the usual forms of transfer applicable to such stocks and shares.

In the case of leasehold property, where the lease provides for a licence to assign, it will be necessary to obtain such a licence on the appointment of a new trustee.

Where the settlement is effected by two deeds, as is the proper way, one being a conveyance of property on trust for sale and the other being a deed declaring the trusts upon which the proceeds are to be held, the same trustees must be appointed for both deeds, and the appointments must be by

separate deeds, and a memorandum of the deed of appointment must be endorsed on the conveyance on trust for sale. In the case of settled property a memorandum of the names and addresses of the persons who are for the time being trustees for the purposes of the Settled Land Act, 1925, must be endorsed on or annexed to the principal vesting deed, and simultaneously therewith a deed of declaration as to the present trustees must be prepared. (See Form No. 8 in Appendix E.)

In addition to the appointment of trustees dealt with in the Trustee Act, there are provisions made for the appointment of trustees for the purposes of certain of the transitional provisions of the 1925 legislation, which are as follows—

1. Where an infant was beneficially entitled to a legal estate on the 1st January, 1926, and there were no trustees and no persons having power under the settlement (if any) under which the interest was derived to appoint trustees, the parents, or, failing them, the guardians of the infant may appoint trustees to displace the Public Trustee in whom the legal estate vested (Settled Land Act, 1925, Second Schedule, paragraph 3).

2. Where property was vested in an infant as sole personal representative, trustee or mortgagee, there is a like power to appoint trustees under the Law of Property Act, 1925, First Schedule, Part III, para. 3.

3. Where property was vested in several persons, one being an infant, if there should be only one other person of full age, the parents or guardians

may appoint another trustee under Part III paras. 2 and 4 of the First Schedule to the last mentioned Act.

4. Where property was vested in more than four beneficial owners, or any undivided share was mortgaged or the subject of a settlement, the owners of more than one half of the entirety of the property may (with the consent of any mortgagee of such owners' shares) appoint two or more trustees to displace the Public Trustee in whom the legal estate vested by the Law of Property Act, 1925. Trustees or other persons in a fiduciary capacity are included in the term "owners" for this purpose.[1]

As there is no direct reference to Section 36 of the Trustee Act in the case of appointments made under the Law of Property Act some doubt has been expressed as to whether the appointors can make self-appointments as is permitted by the Trustee Act. This, however, has been commonly done, and there seems no valid reason for doubting the legality of such a course.

There is also a power to appoint trustees conferred on personal representatives by Section 42 (1) of the Administration of Estates Act, 1925, which reads as follows—

> Where an infant is absolutely entitled under the will or on the intestacy of a person dying before or after the commencement of this Act (in this subsection called "the deceased") to a devise or legacy, or to the residue of the estate of the deceased, or any share therein, and such devise, legacy, residue, or share is not under the will, if any, of the

[1] *Darlington* v. *Darlington*, [1926] W.N. 192; *Cliff and English Electric Co.'s Contract Re*, [1927] 2 Ch. 94.

deceased devised or bequeathed to trustees for the infant, the personal representatives of the deceased may appoint a trust corporation or two or more individuals, not exceeding four (whether or not including the personal representatives or one or more of the personal representatives), to be the trustee or trustees of such devise, legacy, residue or share for the infant, and to be trustees of any land devised or any land being or forming part of such residue or share for the purposes of the Settled Land Act, 1925, and of the statutory provisions relating to the management of land during a minority, and may execute or do any assurance or thing requisite for vesting such devise, legacy, residue or share in the trustee or trustees so appointed.

On such appointment the personal representatives, as such, shall be discharged from all further liability in respect of such devise, legacy, residue, or share, and the same may be retained in its existing condition or state of investment, or may be converted into money, and such money may be invested in any authorised investment.

On this section, in a case where an intestate died in 1926 leaving a widow and two children it was held that the section did not apply because the widow had a life interest in half the estate, and because the children were only contingently entitled on attaining 21, or marrying. Therefore in that case after completing their administrative duties the trustees should assent to the estate vesting in themselves as trustees.[1]

In any case where the Public Trustee has been requested to act, and has accepted a trust, no new trustees can be appointed without his consent, except by order of the Court. When new trustees are appointed in the place of the Public Trustee before he has accepted a trust, the legal estate will by statute be divested from the Public Trustee

[1] *Re Yerburgh ; Yerburgh* v. *Yerburgh,* [1928] W.N. 208.

and vested in the trustees so appointed (Law of Property Act, 1925, First Schedule, Part III, para. 3 (i); Part IV para. 1 (3) (iv), and (4), (iii), (iv)).

Section 18 of the Trustee Act, 1925, provides that where a trust or power is given to or imposed on several trustees the same may be exercised by the survivors or survivor, and, until the appointment of new trustees, the personal representatives of a sole trustee or of the last surviving or continuing trustee shall be capable of exercising any such trust or power. This is, however, without prejudice to the requirements of the Act that two trustees must act on a sale, etc., and a personal representative does not include an executor who has renounced or has not proved the will.

Provisions are also made by the Trustee Act, 1925, for the appointment of new or additional trustees by the Court "whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court." In addition, the Court can make an order appointing a new trustee in substitution for a trustee who is convicted of felony, or is a lunatic, or a defective, or is a bankrupt, or a corporation which is in liquidation or has been dissolved. The Chancery Court, however, has no power to appoint an executor or administrator, as that is a prerogative of the Probate Court.

If a corporation, other than the Public Trustee, is appointed, the Court may authorise the corporation to charge such remuneration for its services

as trustee as the Court may think fit. The Public Trustee has his own scale of fees.

Although, as has been already mentioned, a trustee is not entitled to make any charge for his services as trustee, the Court will, under exceptional circumstances, grant an allowance. For instance, where the active trustee was a retired Bank Manager and the trust was of some magnitude, and there were considerable changes of investments, the Court has been known to grant him an annual sum as remuneration for his services as trustee.

Any trustee appointed by the Court will have all the powers and authorities as if originally appointed by the trust instrument.

The Court may make a vesting order in any of the following cases—

1. Where the Court appoints a trustee, or where a trustee has been appointed out of Court under any statutory or express power;

2. Where a trustee entitled to or possessed of land or stock solely or jointly with any other person—

(*a*) is under disability;

(*b*) is out of the jurisdiction of the High Court; or

(*c*) cannot be found, or, being a corporation, has been dissolved;

3. Where it is uncertain who was the survivor of two or more trustees;

4. Where it is uncertain whether the last trustee known to have been entitled or possessed of the property is living or dead;

5. Where there is no personal representative of a deceased trustee, or where it is uncertain who is such personal representative;

6. Where a trustee has been required by or on behalf of any person entitled to require a conveyance or transfer to convey or transfer and has wilfully refused or neglected to do so for twenty-eight days after the date of such requirement;

7. Where land or any interest therein is vested in a trustee by way of mortgage or otherwise, and it appears to the Court to be expedient to make the order.

Any such order may be made on the application of any person beneficially interested in the land, stock, or thing in action subject to the trust, whether under disability or not, or on the application of any duly appointed trustee thereof.

For the purposes of Section 36 of the Trustee Act, a trustee who has been removed under a power in the trust instrument is treated as if he were dead, or, in the case of a corporation, as if it desired to be discharged; and a dissolved corporation is treated as if it were incapable of acting.

In the case of a lunatic or defective trustee who is also entitled in possession to some beneficial interest in the trust property, no appointment of a new trustee to take his place can be made under Section 36 of the Trustee Act, 1925, without the leave of the Judge or Master in Lunacy.

Where an appointment is made by the personal representatives of the last surviving or continuing trustee, the concurrence of any executor who has

renounced or has not proved is not required, but a sole or last surviving executor intending to renounce, or all the executors if they all intend to renounce, may make the appointment before renouncing. If a testator has appointed two trustees and both die in his lifetime the power of appointment does not extend to the personal representatives of the last of such persons who has so predeceased the testator.[1]

[1] *Nicholson* v. *Field*, [1893] 2 Ch. 511.

CHAPTER XX

TRUSTS ON INTESTACY

In all cases where a person dies intestate leaving a husband or widow surviving and any relative not more remote than a first cousin and his or her net estate, exclusive of "personal chattels," exceeds the sum of £1,000, there must be a trust. This will be so whether or not the deceased leaves any issue, because a first cousin succeeds to the capital of such excess estate in preference to a widow or a husband.

The surviving spouse has a first claim on the estate for £1,000 in addition to the personal chattels, which chattels go absolutely to such surviving spouse.

Personal chattels are thus defined in the Administration of Estates Act—

> Carriages, horses, stable furniture and effects (not used for business purposes), motor-cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, wines, liquors and consumable stores, but not any chattels used at the date of the death of the intestate for business purposes, nor money, nor securities for money.

A table showing the distribution of the residuary estate of an intestate will be found in Appendix D.

We must deal especially with the first charge of £1,000 which carries interest at the rate of 5 per

centum from the date of the intestate's death. This sum has to be paid free of duty. Of course, if the net estate, other than the personal chattels, does not exceed £1,000 in value, it all goes to the surviving spouse, who, in such a case, would alone be entitled to take out the Letters of Administration. Where there is a life interest or a minority arising under an intestacy the Rules of the Court of Probate require two administrators.

It is a matter of supreme practical importance that the £1,000 for the surviving spouse should be provided and paid over as soon as possible because it has been decided that this *plus the interest at 5 per cent from the date of the death* constitutes a charge on the capital of the estate.[1] A consequence of this is that notwithstanding that the surviving spouse may be receiving the whole of the income produced by the entire estate, he or she would be entitled, until the £1,000 has been appropriated and paid over, to receive interest on that sum up to the time of such appropriation and payment. It is, therefore, the duty of the administrators at as early a date as possible to raise and pay over this sum, or to appropriate securities to that value and have the same transferred to the surviving spouse. If there is a delay in this it will be seen that the surviving spouse will be receiving interest at the rate of £50 per annum to the detriment of the person or persons entitled to the residue of the estate.

Provision has been made for raising this £1,000

[1] *Re Saunders; Public Trustee* v. *Saunders*, [1929] 1 Ch. 674.

by Section 48 (2) of the Administration of Estates Act, 1925, as follows—

> (2) The personal representative may raise—
> (*a*) the net sum of one thousand pounds or any part thereof and the interest thereon payable to the surviving husband or wife of the intestate on the security of the whole or any part of the residuary estate of the intestate (other than the personal chattels), so far as that estate may be sufficient for the purpose or the said sum and interest may not have been satisfied by an appropriation under the statutory power available in that behalf.

There may, however, be an instance under which the £1,000 is not immediately to be paid over. Thus, in a case where a testator gave his residuary estate to his trustees upon trust for sale and conversion, and, after payment of the income to his wife for life, to be held in trust to divide the estate between his surviving brothers and sisters, and where all the brothers and sisters died in the lifetime of the testator, an intestacy arose, it was held that the trust for sale in the will precluded the trust for sale under Section 33 of the Administration of Estates Act taking effect. Consequently, the widow could not call for a sale of the reversion, but on her death her estate would be entitled to receive the sum of £1,000 with interest at 5 per cent from the death of the testator.[1]

Section 33 above referred to is as follows—

> 33.—(1) On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives—
> (*a*) as to the real estate, upon trust to sell the same; and
> (*b*) as to the personal estate upon trust to call in sell and

[1] *McKee, Re; Public Trustee* v. *McKee*, [1931] 2 Ch. 145.

convert into money such part thereof as may not consist of money, with full power to postpone such sale and conversion for such a period as the personal representatives, without being liable to account, may think proper, and so that any reversionary interest be not sold until it falls into possession, unless the personal representatives see special reason for sale, and so also that, unless required for purposes of administration owing to want of other assets, personal chattels be not sold except for special reason.

(2) Out of the net money to arise from the sale and conversion of such real and personal estate (after payment of costs), and out of the ready money of the deceased (so far as not disposed of by his will, if any), the personal representative shall pay all such funeral, testamentary, and administration expenses, debts and other liabilities as are properly payable thereout having regard to the rules of administration contained in this Part of this Act, and out of the residue of the said money the personal representative shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased.

(3) During the minority of any beneficiary or the subsistence of any life interest and pending the distribution of the whole or any part of the estate of the deceased, the personal representatives may invest the residue of the said money, or so much thereof as may not have been distributed, in any investments for the time being authorised by statute for the investment of trust money, with power, at the discretion of the personal representatives, to change such investments for others of a like nature.

(4) The residue of the said money and any investments for the time being representing the same, including (but without prejudice to the trust for sale) any part of the estate of the deceased which may be retained unsold and is not required for the administration purposes aforesaid, is in this Act referred to as "the residuary estate of the intestate."

Redemption of Life Interest

Where there is no issue of the marriage and payment can be made to the persons entitled, subject to the life interest of the surviving spouse, it may

be desired to wind up the estate forthwith. In such a case advantage can be taken of Section 48 of the Administration of Estates Act, 1925, which provides as follows—

> (1) Where a surviving husband or wife is entitled to a life interest in the residuary estate or any part thereof the personal representative may, either with the consent of any such tenant for life (not being also the sole personal representative), or, where the tenant for life is the sole personal representative, with the leave of the Court, purchase or redeem such life interest (while it is in possession) by paying the capital value thereof (reckoned according to tables selected by the personal representative) to the tenant for life or the persons deriving title under him or her and the costs of the transaction, and thereupon the residuary estate of the intestate may be dealt with or distributed free from such life interest.

It is strange that "personal representative" is used in the singular in this subsection, as provision has been made that where there is a life interest or a minority, administration will not be granted to a single administrator.

CHAPTER XXI

POWERS OF APPROPRIATION

For convenience in winding up the estate of a testator or intestate Section 41 of the Administration of Estates Act, 1925, has conferred power on the personal representative to appropriate and set aside portions of the estate in satisfaction of any share in the estate.

This power extends to any part of the real or personal estate of the deceased in the actual condition in which it is at the time of appropriation, and the power is applicable whether the deceased died intestate or not, and whether before or after the 1st January, 1926. It also extends to property over which the deceased exercised a general power of appointment including the statutory power to dispose of entailed interests. It also covers the setting aside of a fund to satisfy an annuity by means of the income thereof or otherwise. The exercise of the power is governed by the following conditions—

1. It must not prejudice any specific devise or bequest;

2. If made to a person absolutely entitled, it must be with his or her consent;

3. When made in respect of any settled interest, the consent of the trustees entitled must be obtained;

4. If the person interested is an infant, or a

lunatic or defective, the consent must be given on his or her behalf by his parent or guardian, committee or receiver. If there is no parent or guardian of an infant, the consent must be given by the Court on the application of his next friend;

5. If no committee or receiver of a lunatic has been appointed, provided the appropriation is of an investment authorised by law or the will, no consent is required;

6. If there is no trustee of a settled legacy and no person of full age and capacity entitled to the income, no consent is needed if an authorised investment is appropriated.

It is stipulated that any property duly appropriated under the above powers shall thereafter be treated as an authorised investment, and may be retained or dealt with accordingly.

With a view to any such appropriation, the personal representative may ascertain and fix the value of the part to be appropriated, and may employ a duly qualified valuer where necessary, and may make any conveyance or assent requisite for giving effect to the appropriation, and appropriation binds all persons interested in the estate.

In making an appropriation the personal representative must have regard to the rights of any person who may thereafter come into existence or who cannot be found or ascertained at the time of such appropriation and of any other person whose consent is not required by the Act.

On any such appropriation, the property appropriated shall be subject to all the trusts and powers

in the case of a settled legacy, as if no appropriation had been made.

In favour of a purchaser of any property so appropriated, it must be deemed to have been made in accordance with the Act, and that all the requisite consents have been given.

Prior to the power thus conferred by Section 41 of the Administration of Estates Act, executors and trustees under a will which contained a trust for sale or in any other case where the executor was obliged to turn the testator's estate into money for administration purposes the executors or trustees were entitled to make appropriations of specific parts of the estate.[1] Such appropriations carry *ad valorem* stamp duty on the value of the property appropriated.[2]

It is contended by the authorities that the statutory appropriation is still liable for this stamp duty on the ground that as the consent of the legatee is required to the appropriation, the transaction is in the nature of a bargain and sale. It is becoming the custom now to insert provisions in wills that such consent shall not be required so as to avoid this stamp duty. The duty would not be payable on an appropriation (if such it can in that case be called) to the surviving spouse when the estate is under £1,000 nor in the case of its being an appropriation to a residuary legatee.

Any such appropriation can be carried out by way of a vesting assent under the authority of

[1] *Beverly, Re ; Watson* v. *Watson*, [1901] 1 Ch. 681.
[2] *Dawson* v. *Inland Revenue Commissioners* (1905), 2 Ir. R. 69.

Section 36 (1) of the Administration of Estates Act, and a memorandum of the transaction should be endorsed on the Probate or Letters of Administration in pursuance of that section, and such assent should contain an acknowledgment for the production of the Probate or Letters of Administration.

CHAPTER XXII

APPOINTMENT OF AGENTS AND DELEGATION OF POWERS

WHILST a trustee is at all times required to keep a vigilant eye on the trust property and, except when the power is delegated whilst he may be going abroad, personally to use his discretion in the management of the trust, he is not bound slavishly to carry out all ministerial work in connection therewith. Section 23 of the Trustee Act, 1925, confers on him the following powers of delegation—

> (1) Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a solicitor, banker, stockbroker, or other person, to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or intestate's estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith.

It must not be inferred from this that there is any authority for a trustee to charge for any services personally rendered by him if he should be a solicitor, banker, or stockbroker. To enable him to make such a charge he must be expressly authorised to do so by the trust deed.

Section 23 (*supra*) goes on to provide that—

> (3) (*a*) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under

the trust, by permitting the solicitor to have the custody of, and to produce, a deed having in the body thereof or endorsed thereon a receipt for such money or valuable consideration or property, the deed being executed, or the endorsed receipt being signed by the person entitled to give a receipt for that consideration;

(*b*) A trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment, and the production of any such deed by the solicitor shall have the same statutory validity and effect as if the person appointing the solicitor had not been a trustee;

(*c*) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of insurance, by permitting the banker or solicitor to have the custody of and to produce the policy of insurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment:

Provided that nothing in this subsection shall exempt a trustee from any liability which he would have incurred if this Act and any enactment replaced by this Act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor, as the case may be, to pay or transfer the same to the trustee.

In a case on Sections 23 (1) and 30 (1) of the Trustee Act, a sole executor employed a solicitor who had, unknown to the executor, at one time been suspended from practice, to wind up the estate of which he was executor. The solicitor obtained money from the Post Office Savings Bank and misappropriated it, and an action was brought by the beneficiaries against the executor alleging he was guilty of a breach of trust. It was held that the executor had authority under Section 23 (1) to

appoint a solicitor and by Section 30 (1) he was not liable for the loss unless caused by his own wilful default, and that although the executor was guilty of an error of judgment this did not amount to "wilful default" on his part.[1]

In the same section (Sec. 23) there is also the following clause with regard to the management of property situate outside the United Kingdom—

> (2) Trustees or personal representatives may appoint any person to act as their agent or attorney for the purpose of selling, converting, collecting, getting in, and executing and perfecting insurances of, or managing or cultivating, or otherwise administering any property, real or personal, moveable or immovable, subject to the trust or forming part of the testator's or intestate's estate, in any place outside the United Kingdom, or executing or exercising any discretion or trust or power vested in them in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions as they may think fit, including a power to appoint substitutes, and shall not, by reason only of their having made such appointment, be responsible for any loss arising thereby.

A trustee who is going abroad for a period exceeding one month has power to delegate the trust including discretionary acts. The conditions on which this may be done are contained in Section 25 of the Trustee Act, 1925, and are as follows—

> (1) The Attorney must not be the only other trustee of the trust unless such other trustee is a Trust Corporation;
>
> (2) The donor of the power will remain liable for the acts or defaults of his Attorney;
>
> (3) The power shall not come into operation unless and until the donor is out of the United Kingdom and shall be revoked by his return;
>
> (4) The power must be attested by at least one witness

[1] *Re Vickery; Vickery* v. *Stephens*, [1931] 1 Ch. 572.

and filed at the Central Office within ten days of its execution, or, if executed abroad, within ten days of its arrival in this country, with a Statutory Declaration by the donor that he intends to remain out of the United Kingdom for a period exceeding a month from the date of the declaration or from a date therein mentioned;

(5) The execution of the power and statutory declaration must be verified as required in the case of powers of attorney filed at the Central Office, i.e. by a declaration by the attesting witness;

(6) If the power confers a power to dispose of land or a charge registered under the Land Registration Act, 1925, an office copy shall be filed at the Land Registry;

(7) The statutory declaration aforesaid and a statutory declaration by the donee of the power that the power has come into operation and has not been revoked by the return of the donor, shall be conclusive evidence of the facts stated in favour of any person dealing with the donee.

It is also provided in favour of a person dealing with the donee of the power that anything done by the latter, although the power has not come into operation or has been revoked by death or otherwise, shall be valid unless such person has actual notice to the contrary. The power will also authorise the donee to appoint substitutes for such purposes as transferring stocks at the Bank of England, but the power is not to be construed as giving notice of a trust.

The term "Trustee" includes a tenant for life or statutory owner.

CHAPTER XXIII

GETTING IN OF THE TRUST PROPERTY

In the case of a will where the executors and trustees are not the same persons, it is the duty of the trustees to see that all the testator's property is transferred to them as soon as the executors have completed their work of administration. Where they are the same persons and there is any real or leasehold property they should record the completion of such administrative work by an assent in writing in favour of themselves as trustees.

It often happens that there is property outstanding under a settlement, for very frequently reversionary interests are the subject of a settlement.

With regard to the getting in of the trust estate, powers have been conferred on trustees by Section 22 of the Trustee Act, 1925—

> To agree or ascertain the value in such manner as they may think fit; to accept authorised investments at their market value; to allow deductions for debts, costs, charges, and expenses which they may think proper or reasonable; to execute any release in respect of the premises so as effectually to discharge all accounting parties from all liabilities in respect of any matters coming within the scope of the release without being responsible for any loss occasioned by any act or thing done by them in good faith.

Trustees are not obliged (unless and until requested in writing by persons beneficially interested in the trust, or the guardian of any such person, and unless due provision is made to their

satisfaction for payment of the costs of any proceedings required to be taken) to place any distringas or stop orders on any securities or to take any proceedings for the recovery of the same. This provision, however, is not to relieve the trustees from liability to get in and obtain payment of the trust property on the same falling into possession.

As we have already seen, in the case of settled land, the powers of management are vested in the tenant for life, and the legislature has made provision for the tenant for life, with the consent of the trustees, to settle claims, etc., in respect of the settled land. It is provided by Section 58 of the Settled Land Act, 1925, that—

> (1) A tenant for life may, with the consent in writing of the trustees of the settlement, either with or without giving or taking any consideration in money or otherwise, compromise, compound, abandon, submit to arbitration, or otherwise settle any claim, dispute, or question whatsoever relating to the settled land, or any part thereof, including in particular claims, disputes or questions as to boundaries, the ownership of mines and minerals, rights and powers of working mines and minerals, local laws and customs relative to the working of mines and minerals, and other matters, manorial incidents, easements, and restrictive covenants, and for any of those purposes may enter into, give, execute, and do such agreements, assurances, releases, and other things as the tenant for life may, with such consent as aforesaid, think proper.
>
> (2) A tenant for life may, with the consent in writing of the trustees of the settlement, at any time, by deed or writing, either with or without consideration in money or otherwise, release, waive or modify, or agree to release, waive, or modify, any covenant, agreement, or restriction imposed on any other land for the benefit of the settled land, or any

part thereof, or release, or agree to release, any other land from any easement, right or privilege, including a right of pre-emption, affecting the same for the benefit of the settled land, or any part thereof.

The following provisions are made by the Administration of Estates Act for the recovery of debts due to a deceased's estate—

Section 26. (1) For any debt (including arrears of rent) due to a deceased person, and for any injury to or right in respect of his personal estate in his lifetime, his personal representative shall have the same right of action as the deceased would have had if alive.

(2) The personal representative of a deceased person may maintain for any injury committed to the real estate of the deceased within six months before his death any action which the deceased could have maintained, but the action must be brought within one year after his death, and any damages recovered in the action shall be part of the personal estate of the deceased.

(3) A personal representative may distrain for arrears of a rentcharge due or accruing to the deceased in his lifetime on the land affected or charged therewith, so long as the land remains in the possession of the person liable to pay the rentcharge or of the persons deriving title under him, and in like manner as the deceased might have done had he been living.

(4) A personal representative may distrain upon land for arrears of rent due or accruing to the deceased in like manner as the deceased might have done had he been living.

Such arrears may be distrained for after the termination of the lease or tenancy as if the term or interest had not determined, if the distress is made—

(*a*) within six months after the termination of the lease or tenancy;

(*b*) during the continuance of the possession of the lessee or tenant from whom the arrears were due.

The statutory enactments relating to distress for rent apply to any distress made pursuant to this subsection.

(5) An action may be maintained against the personal representative of a deceased person for any wrong committed

by the deceased within six months before his death to another person in respect of his property, real or personal, but the action shall be brought within six months after the personal representative of the deceased has taken out representation.

Any damages recovered in the proceedings shall be payable as a simple contract debt incurred by the deceased.

(6) Nothing in this section affects the right of action conferred by the Fatal Accidents Act, 1846, as amended by any subsequent enactment.

CHAPTER XXIV

ADVERTISEMENTS FOR CREDITORS

SECTION 27 of the Trustee Act, 1925, contains provisions for enabling a trustee to advertise for creditors before he proceeds to distribute his trust estate. The section is stated to apply "notwithstanding anything to the contrary in the will or trust instrument (if any) creating the trust."

This is the section in full as amended by the Law of Property (Amendment) Act, 1926—

(1) With a view to the conveyance to or distribution among the persons entitled to any real or personal property, the trustees of a settlement or of a disposition on trust for sale or personal representatives, may give notice by advertisement in the *Gazette*, and also, if the property includes land not situated in London in a daily or weekly newspaper circulating in the district in which the land is situated, and such other like notices, including notices elsewhere than in England and Wales, as would, in any special case, have been directed by a court of competent jurisdiction in an action for administration, of their intention to make such conveyance or distribution as aforesaid, and requiring any person interested to send to the trustees or personal representatives within the time, not being less than two months, fixed in the notice or, where more than one notice is given, in the last of the notices, particulars of his claim in respect of the property or any part thereof to which the notice relates.

(2) At the expiration of the time fixed by the notice the trustees or personal representatives may convey or distribute the property or any part thereof to which the notice relates, to or among the persons entitled thereto, having regard only to the claims, whether formal or not, of which the trustees or personal representatives then had notice

and shall not, as respects the property so conveyed or distributed, be liable to any person of whose claim the trustees or personal representatives have not had notice at the time of the conveyance or distribution, but nothing in this section—

(*a*) prejudices the right of any person to follow the property, or any property representing the same, into the hand of any persons other than a purchaser, who may have received it; or

(*b*) frees the trustees or personal representatives from any obligation to make searches or obtain official certificates of search similar to those which an intending purchaser would be advised to make or obtain.

This provision is not compulsory and need not be complied with in cases where the beneficiaries are well known, and where the trustees have had the management of the trust property for some time without having had notice of any claims sent to them.

A form of advertisement framed on this section will be found on page 217.

Payment into Court

It may sometimes happen that there is, notwithstanding any such advertisement and although inquiries may be otherwise instituted, difficulty in establishing who is entitled to the settled funds, and in any such case the trustees may pay the money into Court. Section 63 of the Trustee Act provides that trustees, or the majority, having in their hands or under their control money or securities belonging to a trust may pay the same into Court, and it will then be dealt with according to the orders of the Court. If the majority so

decides, the Court may make such an order notwithstanding the refusal of the minority of the trustees, and may also order any bank or broker having money or securities in their hands to pay or deliver any such money or securities to the trustees for payment into Court.

This is a power which should not be vexatiously or capriciously exercised, and it is probable the trustees may be saddled with the costs if they unreasonably exercise it. In a case where the trustees cannot get a valid discharge, or the beneficiaries cannot be found, they would be justified in paying into Court, but in most other cases the correct course would be for the trustees to take out an Originating Summons for the determination of any matter in dispute.

If a beneficiary is missing, possibly the trustees would be justified in distributing among the ascertained beneficiaries on their obtaining an indemnity against the missing beneficiary reappearing.

CHAPTER XXV

RETIREMENT OF TRUSTEES, BREACHES OF TRUST, AND RELIEF IN RESPECT THEREOF

We have already seen that a trustee may retire from a trust without appointing another trustee in his place, provided there will remain at least two trustees or one who is a trust corporation. At the same time a retirement should not be a capricious act on the part of a trustee. Although a trustee is under no liability to accept a trust, when he has accepted it, he should, unless he has some good excuse for retiring, act in such trust until it be fulfilled.

There is one reason for retirement which should at all events be guarded against. It sometimes happens that in cases of hardship a trustee is desirous of helping a tenant for life though he knows it would be a breach of trust to do so. In such cases the tenant for life may suggest that he should retire in favour of another trustee who is willing to do what is desired by making an unauthorised investment or advancement of trust funds. It cannot be too strongly urged that a trustee cannot relieve himself from responsibility by retiring in order that a breach of trust may be carried out. Where a trustee who himself refuses to commit a breach of trust retires from the trust to facilitate the appointment of another trustee who will commit the breach, and the new trustee does in

fact commit the breach, the retiring trustee as well as the new trustee is liable.[1] The retiring trustee, however, will only be liable for a breach of trust contemplated when the trust funds were handed over to the new trustees and not for a different breach.[2] It has also been held that it is not sufficient to prove that the retiring trustee rendered easy or even intended a breach of trust if it was not in fact committed. He must be proved to be guilty as accessory before the fact of the impropriety actually perpetrated.[3]

In some cases where a breach has been made at the instigation of the tenant for life some relief is afforded by the Trustee Act, 1925. Section 62 of that Act provides—

> (1) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman restrained from anticipation, make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or persons claiming through him.
>
> (2) This section applies to breaches of trust committed as well before as after the commencement of this Act.

There is also a provision in cases where a trustee may have unconsciously committed a breach of trust. Section 61 of the same Act provides—

> If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged

[1] *Palairet* v. *Carew* (1863), 32 Beav. 568; *Webster* v. *Le Hunt* (1861), 9 W.R. 918.

[2] *Clark* v. *Hoskins* (1857), 27 L.J. Ch. 561.

[3] *Head* v. *Gould*, [1898] 2 Ch. 250.

to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve him either wholly or partially from personal liability for the same.

It does not appear to have been ever judicially decided whether a trustee is legally entitled to a release on the termination of the trust. Where, however, a trustee has done anything which can in any way be regarded as a breach of trust, if the beneficiaries are willing to condone such an act, this is best accomplished by a deed of release. Otherwise, in the case of small estates where the matter is very simple as where a particular property or fund is held in trust for certain specified persons to whom such property or fund is eventually handed over or transferred, there is no reason for a deed of release.

As between an executor and a trustee the former no doubt has a stronger claim to a deed of release, for when a person accepts the duty of executorship he generally has no means of knowing what the office may involve or how long it is likely to endure. It may be that the testator is interested in many matters, and may have given guarantees under which there may be pending liabilities, and he may have been responsible for many matters in respect of which the duty may fall on the executor to make reparation, and the executor may be involved in actions or arbitration proceedings to settle any such matters. In the case of a trusteeship,

however, in the majority of cases the duties are defined either by the trust instrument or by law.

In any case, however, an executor or a trustee would be entitled to ask for a receipted account with sufficient words of acknowledgment and ratification by the beneficiaries.

When a deed of release is agreed upon, it should be borne in mind that to give relief in respect of any particular breach of trust the same should be specified. Such a deed differs from most other deeds in that it is governed by its recitals. It may be a lengthy deed, but the operative words are generally very few. To claim the benefit of such a deed, a trustee should be able to show that the releasing parties are all *sui juris*, and that they had full knowledge of any breach and were fully conscious of the effect of the release, and were fully aware of the legal effect of the breach. It should also be shown where the breach was for the benefit of the beneficiaries that they had and retained such benefit, and, lastly, that no undue influence has been used in getting the release from them.

To put the matter plainly, the position of a trustee seeking to have a deed of release is that he must make an "open confession" in respect of any acts of omission or commission, and must in effect say: "I have done so-and-so or neglected to do so-and-so in consequence of which you have suffered to such an extent and I want you to release me in respect of this act or omission."

It is considered that a trustee would have a stronger reason for calling for a deed of release in

cases where his duties may have been increased in any way by the action of the beneficiaries. If, for instance, the beneficiaries have resettled their interests under the original settlement or have created mortgages on their interests under such settlement which would involve negotiations with the mortgagees on the final settlement of accounts, it is considered there would be good ground for asking for a formal deed of release.

In the case of a resettlement the trustees of the original settlement cannot ask the trustees of such settlement to give a release, but only a receipt for any money or securities handed over. The release would have to be given by the beneficiaries themselves.[1]

Where a release is not given it is suggested that a receipt with words of discharge somewhat in the following form might be given at the foot of the trust accounts—

> We have examined and approved the foregoing accounts and ratify and confirm all receipts and payments or allowances therein stated, and we acknowledge to have received from the above mentioned trustees the respective sums set opposite to our respective names in the said accounts in full discharge of our respective shares and interests therein and we respectively agree to keep the said trustees and each of them indemnified from all costs charges or liabilities whatsoever in respect thereof.

[1] *Re Cater's Trusts* (1858), 25 Beav. 361.

CHAPTER XXVI

INDEMNITY AND PROTECTIVE CLAUSES

As it is not possible for all the trustees to have charge of the trust securities, Section 21 of the Trustee Act, 1925, provides that trustees may deposit any documents held by them relating to the trust property with any banker or company whose business includes the undertaking of the safe custody of documents, and that any sum payable in respect of such deposit shall be paid out of the income of the trust property.

By Section 30 of the same Act it is provided that a trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default.

Where, on the appointment of a new trustee and a sale of stock under a Power of Attorney given by a retiring trustee and the continuing trustee, the sale being ordered by the continuing trustee who was a solicitor and to whom the proceeds of sale were paid without any authority from the

retiring trustee and the solicitor misappropriated the money—the retiring solicitor having no suspicion of the solicitor's dishonesty—it was held by the Court of Appeal that the retiring trustee was not guilty of a breach of trust.[1]

Section 26 of the Trustee Act, 1925, contains the following indemnity clause in respect of leasehold property or freehold property subject to a ground rent—

(1) Where a personal representative or trustee liable as such for—

(*a*) any rent, covenant, or agreement reserved by or contained in any lease; or

(*b*) any rent, covenant or agreement payable under or contained in any grant made in consideration of a rent-charge; or

(*c*) any indemnity given in respect of any rent, covenant or agreement referred to in either of the foregoing paragraphs;

satisfies all liabilities under the lease or grant which may have accrued, or been claimed, up to the date of the conveyance hereinafter mentioned, and, where necessary, sets apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum which the lessee or grantee agreed to lay out on the property demised or granted, although the period for laying out the same may not have arrived, then and in any such case the personal representative or trustee may convey the property demised or granted to a purchaser, legatee, devisee, or other person entitled to call for a conveyance thereof and thereafter—

(i) he may distribute the residuary real and personal estate of the deceased testator or intestate, or, as the case may be, the trust estate (other than the fund, if any, set apart as aforesaid) to or amongst the persons entitled thereto, without appropriating any part, or any further part, as the case may be, of the estate of the deceased or

[1] *Munton, Re; Munton* v. *West*, [1927] 1 Ch. 262.

of the trust estate to meet any future liability under the said lease or grant;

(ii) notwithstanding such distribution, he shall not be personally liable in respect of any subsequent claim under the said lease or grant.

(2) This section operates without prejudice to the right of the lessor or grantor, or the persons deriving title under the lessor or grantor, to follow the assets of the deceased or the trust property into the hands of the persons amongst whom the same may have been respectively distributed, and applies notwithstanding anything to the contrary in the will or other instrument, if any, creating the trust.

(3) In this section "lease" includes an underlease and an agreement for lease or underlease and any instrument giving any such indemnity as aforesaid or varying the liabilities under the lease; "grant" applies to a grant whether the rent is created by limitation, grant, reservation, or otherwise, and includes an agreement for a grant and any instrument giving any such indemnity as aforesaid or varying the liabilities under the grant; "lessee" and "grantee" include persons respectively deriving title under them.

Section 97 of the Settled Land Act also provides that the trustees of a settlement, or any of them—

(*a*) are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and

(*b*) in case of a purchase of land with capital money arising under this Act, or of an exchange, lease, or other disposition, are not liable for adopting any contract made by the tenant for life or statutory owner, or bound to inquire as to the propriety of the purchase, exchange, lease, or other disposition, or answerable as regards any price, consideration, or fine; and

(*c*) are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode and;

(*d*) are not liable in respect of purchase-money paid by them by the direction of the tenant for life or statutory owner to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by the direction of the tenant for life or statutory owner on the purchase, exchange, lease, or other disposition.

The following further protective provisions for trustees are contained in Section 98 of the Settled Land Act, 1925—

(1) Where the tenant for life or statutory owner directs capital money to be invested on any authorised security or investment, the trustees of the settlement shall not be liable for the acts of any agent employed by the tenant for life or statutory owner in connection with the transaction, or for not employing a separate agent in or about the valuation of the subject of the security or the investigation of the title thereto, or for the form of the security or of any deed conveying the subject thereof to the trustees.

(2) The trustees of the settlement shall not be liable for paying or applying any capital money by the direction of the tenant for life or statutory owner for any authorised purpose.

(3) The trustees of the settlement shall not be liable in any way on account of any vesting instrument or other documents of title relating to the settled land, other than securities for capital money, being placed in the possession of the tenant for life or statutory owner:

Provided that where, if the settlement were not disclosed, it would appear that the tenant for life had a general power of appointment over, or was absolutely and beneficially entitled to the settled land, the trustees of the settlement shall, before they deliver the documents to him, require that notice of the last or only principal vesting instrument be written on one of the documents under which the tenant for life acquired his title, and may, if the documents are not in their possession, require such notice to be written as aforesaid, but, in the latter case, they shall not be liable in any way for not requiring the notice to be written.

Section 99 of the same Act provides—

Personal representatives, trustees, or other persons who have in good faith, pursuant to this Act, executed a vesting deed, assent, or other conveyance of the settled land, or a deed of discharge of trustees, shall be absolutely discharged from all liability in respect of the equitable interests and powers taking effect under the settlement, and shall be entitled to be kept indemnified at the cost of the trust estate from all liabilities affecting the settled land, but the person to whom the land is conveyed (not being a purchaser taking free therefrom) shall hold the settled land upon the trusts, if any, affecting the same.

PART III

CHAPTER XXVII

TRUST ACCOUNTS

THE precise form which trust accounts should take in any particular trust must depend upon the nature of the trust. It may be that the trust is one relating to some particular sum of stock or a specific property where the accounts will be very small, and on the other hand, the trust may be one of some magnitude involving dealings with a large number of trust securities held upon trusts declared by a settlement of some perplexity.

In the latter case it is strongly urged that it should be made a practice to have a copy of the settlement (or will) copied into the trust accounts book, or if this is not practicable, that there should be a full epitome of the portions which affect or may affect the account.

The full names and addresses of the trustees should be stated as they are registered in respect of the trust securities.

In the case of a marriage settlement care should be taken to distinguish the "husband's" or "gentleman's" funds and the "wife's" or "lady's" funds. It should be noted whether the life interests are in any way qualified, i.e. whether either is to be held on protective trusts and,

in the case of the wife, whether there is a restraint upon anticipation. The book should also show—

1. Whether there is any power of appointment over either of the funds and if so by whom it is exercisable and in what way, i.e. by deed or will, or by will only.

2. Whether the beneficiaries are required to bring advances to them into hotchpot.

3. The ultimate destination of the funds (*a*) in the event of issue of the marriage, and (*b*) if there should be no issue.

4. Whether there is any power for either spouse to withdraw any portion of the settled funds with a view to a second marriage.

5. Whether the deed or will contains any power for either party to appoint new trustees or whether the statutory power applies.

6. Whether there is any investment clause. If so, it should be copied out verbatim.

Although powers may be given to the trustees to apportion blended funds, it is strongly recommended that there should, if possible, be a prevention of this blending as it invariably involves trouble where it occurs. It may be occasioned when the time comes to pay death duty on the death of the survivor of the spouses or on the final division of the funds, especially in cases where there has been no issue of the marriage and the funds go in different directions.

Blending may sometimes be prevented in cases where a portion of each fund is invested in the same

kind of security by having the investments separated into "A" Account and "B" Account. If, as sometimes happens, it is desired to take capital from each fund for an investment on a mortgage security, a note should be made of the amount of capital taken from each fund so that there may be a proper adjustment when the mortgage is repaid.

It will be found most useful to have a page in the trust account book for Memoranda, and the nature of the Memoranda could be such as—

1. A note of all changes of addresses of any of the trustees and the date from which they take effect.

2. A note of any notices received affecting any dealings by any of the beneficiaries with their share in the trust funds, showing briefly what share is affected and the date on which the notice was received.

No. 1 above will be found especially useful in dealings with any Inscribed Stocks forming part of the trust funds, because the addresses of the trustees are never given on the stock receipts which are issued, and often delay and trouble arises owing to some slight differences in the addresses inscribed in the books of the Bank of England or other "domicile" of any particular stock. It is suggested also that as the stock receipts themselves have no intrinsic value they might be pinned into the trust account book and the addresses of the trustees as registered written thereon.

It is also strongly recommended that entries

made in the trust account should be full and explicit. Such entries as—

Purchase of Consols £300

should never appear but it should be somewhat in this way—

	£	s.	d.	£	s.	d.
Purchase of £425 2½% Consols at 70 . .	297	10	–			
Brokerage	2	10	–			
				300	–	–

In the case of some trust securities, it is stated they are available only if purchased at a price not exceeding a certain sum and if the entry is as above it can be at once seen that the law has been complied with, and, further, it is easier to follow the holding with the published lists of quotations.

In entering up particulars of the trust investments, care should be taken that full descriptions are given. For instance, where there are two preference stocks of a company bearing different dates or described as First and Second Preference Stock, the date should always be shown or the designation "First" or "Second" as the case may be. Thus—

5 per cent Preference Stock (1888) of the A.B. Company.

The date is an important factor as there are generally special features attached to each issue of Stock which will affect its price, especially is this so in the case of stocks which are redeemable on a certain date. The date of redemption in such cases always has an effect upon the market quotation of the stock.

A trustee should be ready at all times to produce his trust accounts to the beneficiaries, together with the vouchers, and he should also be prepared to produce the trust securities. If a beneficiary requires a copy of the accounts he should pay the cost thereof. A trustee must also be prepared to give to any beneficiary, or any person inquiring on his behalf, any particulars and information with regard to the investment of the trust funds.

In the case of settled land of any magnitude, as the management is in the hands of the tenant for life and as there is usually an estate office attached to the estate, there will be very little accountancy for the trustees except, of course, in respect of any capital money. This capital money may arise (amongst other ways) on the sale of any portion of the settled land, as an equality of exchange when a portion of the settled land has been exchanged for land of less value, on any apportionment of mining rents, the proceeds of sale of timber when the tenant for life is not entitled thereto, or for fixtures on the property which may be taken at a valuation on any sale.

The costs in connection with any sale are payable out of capital and on the letting of the property it has recently been held that the costs of the lease (so far as not payable by the tenant) may be paid out of capital, but any agent's commission on letting must be paid out of income.[1]

In cases where capital money is laid out in improvements in respect of which the tenant for life

[1] *Re Watson ; Brand* v. *Culme-Seymour*, [1928] W.N. 309.

has to make repayment by instalments it is always a good thing to open a special account thus—

IMPROVEMENTS AT HIGHER FARM

1930			1931		£	s.	d.
Jan. 10.	Cost of Improvement . .	£2000	Jan. 10.	Instalment due this day	100	–	–
			1932 Jan. 10.	Ditto	100	–	–

As previously stated no interest is charged in respect of these payments because the tenant for life would be entitled to the interest.

On the death of the tenant for life, there will doubtless be Estate Duty payable which will be debited against the capital account as also would the costs of passing the account. The costs of an appointment of trustees are also payable out of capital together with the expenses of investing any capital money from time to time.

With regard to the auditing of the trust accounts, Section 22 (4) of the Trustee Act enables a trustee in his discretion to have the accounts examined and audited, but in the absence of any special nature of the trust or any special dealings this should not be oftener than once in every three years. The trustees have a discretionary power of paying the costs out of capital or income, but it is added that, in default of any directions by the trustees in any special case, costs attributable to capital shall be borne by capital, and those attributable to income, by income.

In the case of a Marriage Settlement Trust, it is suggested that the account book should commence either with a full copy of the settlement or a full

epitome giving the particulars before mentioned, and that this should be followed by a full list of the funds settled under two headings "the Gentleman's funds" and "the Lady's fund." These should be copied on the left-hand page of the book leaving the right-hand page blank for annotations as to dealings with any particular portion of the fund, thus—

Gentleman's Funds	
£500 Consols.	Sold 1/1/26. See page .
£1,500 Preference Stock (4%) of Brown & Jones.	Converted into 3½% 1st Pref. Stock 2/1/30.
Lady's Fund.	
£2,400 5% Debenture Stock of Great Western Railway.	Transferred to Mrs. Jones under an appointment made by her 2/1/30.

The item opposite the lady's fund here illustrates a case where there has been no issue of the marriage and the husband is dead. The wife having a power of appointment over her fund exercises it in her own favour. On this the trustees would be justified in transferring the stock to her.

The capital account itself is usually arranged under two headings of Stock and Cash. By having the full list of investments as above suggested, and by marking opposite each item any dealings therewith an accountant would be able to check the transactions with the items in the Capital Account and understand that any item in the list of investments which has no note as to its disposal opposite was still existing. On each transaction of sale or purchase two entries will be necessary, thus—

		Stock or Investment	Cash			Stock or Investment	Cash
1932		£ s. d.	£ s. d.	1932		£ s. d.	£ s. d.
Jan. 1	Consols sold as *per contra* . . .	300 – –		Jan. 1	Proceeds of sale of £300 consols at 70 210 – –		
	Paid Messrs. Smith's professional costs to date . .		9 – –		*Less* Brokerage 1 – –		209 – –
	Advanced T. Brown on mortgage of 22 High St., Bunkum at 5% . . .		200 – –		T. Brown's mortgage on 22 High Street, Bunkum . . .	200 – –	
			£209 – –				£209 – –

It will be seen that the nominal amount of stock is placed under Stock in these accounts.

In the majority of cases an account of income in respect of settled personalty is dispensed with by the giving of directions for the payment of the income direct to the account of the tenant for life. This is accomplished by first giving a direction to each company to pay the dividends or interest to a certain bank. Many companies have their own forms of request, but a general form will be found in the Appendix of forms in this book. This, it will be noted, is just a general direction to send to a bank, as companies will not, as a rule, recognise an authority to pay to any particular account at a bank, but this is overcome by giving a direction to the bank to credit the dividends and interest as received by them to the account with them of the person entitled. A form for this purpose will also be found in the Appendix.

This method saves the trustees a good deal of trouble as if no directions are given the dividends are always sent to the first named trustee, who would then be obliged to endorse each dividend warrant and deal with it. He would also be obliged to collect and save all the counterfoil warrants or dividend "tops" as they are usually called, for the purpose of adjusting the tax payable by the person entitled to the income. Where the dividends are collected by the bank this duty of collecting the "tops" is always undertaken by the bank, who usually send them to the acting trustee (or his solicitor) at intervals.

When mortgage interest is collected on behalf of the trustees, or the person entitled to the income, care should be taken to obtain with the interest a certificate of deduction of tax signed by the mortgagor. This should be obtained on the proper form supplied by the Inland Revenue authorities, and the mortgagee should also be asked to produce his receipt for any tax which he deducts.

In all cases where the income is so paid to a bank it will be found a great convenience to have a register of the trust investments showing the dates of payment of dividends (or interest) on each investment and the probable amount, thus—

Investment	Income Payable	Gross Amount
		£ s. d.
£1,000 Mortgage at 5% on Blackacre	25th March	25 – –
Bristol the property of W. Smith . .	29th Sept.	25 – –
£700 4% Debenture Stock of the Great	February	14 – –
Western Railway	August	14 – –

This book will be found of great assistance in many cases, e.g. when asked to check the income received by the person entitled, or when it is wished to obtain repayment or an adjustment of income tax, and also when an apportionment of income is necessary on the death of the tenant for life.

When an income account is kept by or on behalf of the trustees it is strongly advised that all entries should be made in full showing precisely in respect of what capital sum each item is received, the

period which the payment covers, and the gross amount as well as the tax deducted, thus—

1932		£ s. d.	£ s. d.
April 20.	Half-year's interest on £700 4% Debenture Stock of Smith & Brown due 31/12/31	14 – –	
	Less tax at 5s. in the £ . . .	3 10 –	
			10 10 –

and not merely "Cash from Smith & Brown for interest £10 10s. 0d." The omission to make full entries at the time often involves a great deal of labour and time when it is desired to render an account to a beneficiary, and the additional small labour required to make a full entry when the details are at hand is thus amply rewarded.

In connection with stocks and shares, Bonus Certificates are sometimes issued by companies, and the question arises whether these should be regarded as Capital or Income. On this point the two following recent cases will be found of use—

Re Taylor; Walters v. *Taylor*, [1926] Ch. 923. In this case it was held that if a company distributed bonus shares and questions arise as to whether such shares are capital or income, the substance, and not the form of the transaction, must be regarded; also that an option given to the shareholders to take the shares in cash does not necessarily determine that it is income and not capital.

Re Bates; Mountain v. *Bates*, [1928] Ch. 682. Here the company paid a bonus in respect of shares and stated that the payment was not a dividend or bonus, but a capital distribution. Notwithstanding this statement, Mr. Justice Eve held that though

the company could have capitalized the surplus fund by the issue of bonus shares, that was the only way in which the fund could have been capitalized. As this had not been done, the money must be treated as income.

It seems from this that where there is a cash bonus distribution it can safely be regarded as income, but if the distribution be in the nature of the allocation of shares, the circumstances of the distribution must be considered, as it may be either capital or income.

In the consideration of trusts arising under a will there are two important matters to be observed which do not arise in the case of a marriage settlement trust. There is first, the order of payment of debts, that is, the order in which a testator's estate is liable for such payment. Then, in the case of property subject to a mortgage or charge created by the testator and which property is specifically bequeathed, we have to consider who is responsible for payment of the mortgage or charge.

Order of Payment of Debts

There is first of all the right of a personal representative to retain a debt due to him from a testator or intestate. This right is a very ancient one, and was established for the very good reason that a personal representative cannot sue himself for a debt: he cannot be both plaintiff and defendant in the same action. The right has from time to time been extended, and it is now governed by

Section 34 (2) of the Administration of Estates Act, 1925, which provides that—

> The right of retainer of a personal representative and his right to prefer creditors may be exercised in respect of all assets of the deceased but the right of retainer shall only apply to debts owing to the personal representative in his own right whether solely or jointly with another person.

It was held that an executor could exercise this right, where the estate was insolvent, against the Crown in respect of assessed taxes, but this decision has since been overruled by the House of Lords.[1]

The order for payment of debts is set out in the First Schedule to the Administration of Estates Act, 1925, as follows—

Part I. Rules as to payment of debts where the estate is insolvent.

1. The funeral, testamentary, and administration expenses.

2. Subject thereto, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt.

Part II. Order of application of assets where the estate is solvent.

1. Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies.

2. Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.

3. Property of the deceased specifically appropriated or

[1] *A.-G. v. Jackson*, [1932] W.N. 61.

devised or bequeathed (either by a specific or general description) for the payment of debts.

4. Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts.

5. The fund, if any, retained to meet pecuniary legacies.

6. Property specifically devised or bequeathed, rateably according to value.

7. Property appointed by will under a general power, including the statutory power to dispose of entailed interests, rateably according to value.

8. The following provisions shall also apply—

(*a*) The order of application may be varied by the will of the deceased.

(*b*) This part of this schedule does not affect the liability of land to answer the death duty imposed thereon in exoneration of other assets.

It is declared by Section 34 of the Act that this order is subject to any contrary intention shown by the will of the deceased.

There have been several cases on paragraph 1 of Part II. Where a share in a residuary estate lapsed owing to the death of the legatee in the testator's lifetime it was held that this share was property not disposed of, as the paragraph means "effectively" disposed of.[1] A testator devised his residuary estate upon trust for sale and conversion, and after payment of his debts, etc., gave the residue thereof as to one-half to his wife and the other half to his daughters. The wife predeceased the testator and her moiety lapsed. It was held that the debts were payable out of the residue of the estate as a whole, seeing that there was a direction for the payment of debts and the residue could only

[1] *Re Lamb ; Vipond* v. *Lamb*, [1929] 1 Ch. 722.

be ascertained after payment of debts.[1] A testator devised his real estate to a brother who predeceased him. He gave his personal estate to trustees upon trust for sale and payment of debts. It was held that although, *prima facie*, the fund for payment of debts was the lapsed devise yet the direction to pay debts relieved it of this liability.[2] A testator devised all his freehold and personal estate to his trustees subject to payment of debts upon trust for several persons, some of whom predeceased the testator. In this case the Court of Appeal held that the personal estate was liable and not the lapsed shares.[3] A testator gave the income of a share of residue to A for life, this gift lapsed, and the Court of Appeal held that this was the fund for payment of the debts.[4] A will contained a direction for the payment of debts and the residue was settled on X for life and then on Y and Z. The gift to Y lapsed, and it was held that the debts were payable out of the whole residue.[5] Where a will indicates with reasonable clearness the intention of the deceased as to the property liable to the payment of debts and funeral and testamentary expenses the Act is to take effect subject to any variation required to carry out that intention.[6]

Where a testator had a general power of appointment exercisable with the consent of the trustees over funds which he appointed by deed, it was

[1] *Re Petty ; Holliday* v. *Petty*, [1929] 1 Ch. 726.
[2] *Re Atkinson, Webster* v. *Walter*, [1930] 1 Ch. 47.
[3] *Re Kempthorne*, [1930] 1 Ch. 268.
[4] *Re Tong ; Hilton* v. *Bradbury*, [1931] 1 Ch. 202.
[5] *Re Cruse, Gass* v. *Ingham*, [1930] W.N. 206.
[6] *Re Littlewood ; Clark* v. *Littlewood*, [1931] 1 Ch. 443.

held that the funds were liable, on a deficiency of assets, for payment of debts on the testator's death, and that the fact that consent to the appointment was necessary did not prevent its being a general power, as though the trustees might veto the exercise they could not select the objects to whom the property might be appointed.[1]

The decision in the case of *Re Tong* has been upheld by the Court of Appeal in a case where a Testator, after bequeathing certain pecuniary legacies free of legacy duty, gave the residue of his property equally between A and B and the gift to B had lapsed.[2] In the lower Court it had been decided that though the debts and funeral and testamentary expenses were payable out of A's share, the legacies must be paid out of the general estate before the shares of residue were ascertained. The Court of Appeal, however, decided that the case was governed by in *Re Tong*, and that there was nothing in the will to alter the statutory order.

A personal representative may prefer a pressing creditor by making to him an equitable assignment of part of the assets even though the estate may prove to be insolvent.[3]

A personal representative may (though he is not bound to do so) pay any debt due from the deceased though it may be statute barred, provided it has not been duly adjudged a statute barred debt by a court of law.

[1] *Re Phillips; Lawrence* v. *Huxtable*, [1931] 1 Ch. 347.
[2] *Re Worthington; Nichols* v. *Hart*, [1933] W.N. 131.
[3] *Re Williams; Richards* v. *Williams*, [1930] 2 Ch. 283.

It will have been noticed that both in the case of a solvent and insolvent estate, the funeral and testamentary expenses have the first claim. Funeral expenses are restricted to such sums as are reasonable and necessary, having regard to the probable value of the assets and to the testator's condition in life.

In the case of bankruptcy, after the payment of funeral and testamentary expenses, the debts rank in the following order—

(*a*) Rates due at the time of death and having become due and payable within twelve months before that time and all assessed taxes to the 5th April before the death, not exceeding one year's assessment.

(*b*) Wages, salary, or commission of any clerk or servant in respect of services rendered to the deceased during the four months immediately before his death, not exceeding £50.

(*c*) Wages of any labourer or workman not exceeding £25 in respect of services rendered to the deceased during two months before his death.

(*d*) Any compensation payable under the Workmen's Compensation Act.

(*e*) Contributions under the National Health Insurance Act, 1924, or the Unemployment Insurance Act, 1920, in respect of employed contributors and employed persons during the four months before the death.

These five items rank equally between themselves, and if there has been any distraint by the landlord within three months before the death the

debts are a first charge on the property distrained or the proceeds of sale thereof; the landlord, however, having in respect of any money paid under any such charge the same rights of priority as the person to whom such payment is made.

All other debts rank *pari passu* except—

1. Money or other estate of a wife lent or entrusted by her to her husband for the purpose of any trade or business (but a loan for personal purposes is not postponed (see *Re Clarke, Ex parte Schultze,* [1898] 2 Q.B. 330).

2. Money or property similarly lent or entrusted by a husband to a wife.

3. Money lent to the deceased on a contract that the lender shall receive a rate of interest varying with the profits of the deceased's business or a share of the profits of the business.

4. Money due to the seller of the goodwill of a business in respect of a share of the profits which the deceased when buying the business contracted to pay.

These four items are postponed until the other debts for valuable consideration have been satisfied.

Property Subject to a Mortgage or Charge

Prior to 1926 if a testator devised real property which was subject to a mortgage or charge to a person, that person had to take the property subject to the charge. This was the effect of the Statutes known as the Real Estate Charges Acts of 1854, 1867, and 1877 familiarly referred to as

"Locke King's Act." But if before 1926 a testator had bequeathed personal property so charged, in the absence of any direction to the contrary, the beneficiary would have been entitled to the property free from the charge, which would have to be paid off out of the residuary personal estate of the testator. This inequality has now been remedied by Section 35 of the Administration of Estates Act, 1925. This section provides—

(1) Where a person dies possessed of, or entitled to, or, under a general power of appointment (including the statutory power to dispose of entailed interests) by his will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid purchase money), and the deceased has not by will deed or other document signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof.

(2) Such contrary or other intention shall not be deemed to be signified—

(*a*) by a general direction for the payment of debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate; or

(*b*) by a charge of debts upon any such estate;

unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.

(3) Nothing in this section affects the rights of a person entitled to the charge to obtain payment or satisfaction thereof either out of the other assets of the deceased or otherwise.

A testator gave a policy of insurance which was subject to a mortgage to A, and directed that his

debts should be paid out of a special fund. It was held that the special fund was primarily liable to pay off the mortgage debt on the policy, as the direction to pay the debts out of that fund was a sufficient indication of a contrary intention within the meaning of the above section, and as the fund was not sufficient to pay off the whole it was also held that in so far as it was insufficient the sum was payable out of the policy money.[1] This decision follows a decision in an earlier case.[2] In another case a testator gave his farming stock to A and B, charged with the payment of his debts and funeral and testamentary expenses, and gave the residue to C. Here it was held that the farming stock was liable.[3]

In any case, therefore, where a deceased testator has an overdrawn account at his bank and has lodged securities to secure the same, care should be taken to ascertain what securities have been so lodged, as if any of such securities have been specifically dealt with by the will, a liability for a proportion of the overdrawn account would attach thereto. For this purpose, it is presumed the proper course would be to allocate the amount of the overdraft to such securities which have been so lodged, proportionately to the value of such securities at the time of the death. Thus, if securities of the total value of £5,000 at the date of death are lodged to secure an overdraft amounting to £1,000

[1] *Re Fegan ; Fegan* v. *Fegan,* [1928] Ch. 45.
[2] *Re Birch,* [1909] 1 Ch. 787.
[3] *Re Littlewood ; Clark* v. *Littlewood,* [1931] 1 Ch. 443.

and one of these securities of the value of £1,500 is bequeathed to A, in the absence of any contrary intention to be gathered from the will, A would be liable to contribute £300 towards the overdraft.

Legacies

There are three kinds of legacies, general, specific or demonstrative. A "specific" legacy is a gift of a specified article. By a specified article is meant something which can be separately identified such as "my cabinet" or "the sum of £500 3½ per cent War Loan standing in my name." In such a case if the specific article is not in existence at the time of the testator's death the legacy is said to be "adeemed," and the legatee gets nothing. There are numerous cases relating to specific gifts showing when they take effect and when they fail. The law governing the subject is really Section 24 of the Wills Act, 1837, which provides that—

> Every will shall be considered with reference to the real and personal estate comprised in it to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

Among other decisions, there are the following—

Where a testator made a specific gift of leasehold property and then purchased the freehold reversion it was held that the fee simple of the property passed by the gift.[1] Where a testator sold, subsequent to the date of his will, land which he had specifically devised, and took a mortgage thereon, it was held

[1] *Saxton* v. *Saxton* (1879), 13 Ch. D. 359.

that the mortgage did not pass to the legatee.[1] Where a testator gave "My present lease" to his daughter and that lease expired and he had taken another lease, and had made a codicil confirming his will, it was held that the new lease passed to the daughter.[2] Where property was specifically devised after an option of purchase had been granted over the land, the devisee is entitled to the purchase money if the option is exercised as to part of the property.[3] Where a testatrix bequeathed "my piano" by her will and subsequently sold that piano and bought another it was held that the new piano did not pass.[4]

A specific legacy carries all accretions thereto, and also carries the income as from the date of the testator's death.[5]

The law forbidding the holding of a legal estate in undivided shares in property and thereby notionally converting such shares into personalty had a drastic effect in some cases. For instance, where there was a devise of real property to a brother it was held this did not carry undivided shares.[6] The words "all my share and interest" in property have been held sufficient to carry such undivided shares.[7] In another case the words "All my real estate and undivided shares in real estate" were held sufficient, but in that case there

[1] *Re Clowes*, [1893] 1 Ch. 214.
[2] *Re Reeves ; Reeves* v. *Pawson*, [1928] Ch. 351.
[3] *Re Calow ; Calow* v. *Calow*, [1928] Ch. 710.
[4] *Re Sikes ; Moxon* v. *Crossley*, [1927] 1 Ch. 364.
[5] *Re Buxton ; Buxton* v. *Buxton*, [1930] 1 Ch. 648.
[6] *Re Kempthorne*, [1930] 1 Ch. 268.
[7] *Re Mellish* (1927), referred to *In re Wheeler* (*infra*).

was a codicil executed after 1926 confirming the will.[1] The words "All my moiety or equal half part or share or other share of and in," etc., in a will made in 1922 were insufficient, and it was held there had been ademption by conversion.[2]

A specific legacy, therefore, has one disadvantage that it is so liable to ademption, but as against this it enjoys two advantages, it carries interest from the date of death, and it is not liable to abate so soon as a general legacy.

A "demonstrative" legacy is a legacy coupled with a direction as to the source from which it is to be paid as "I give my brother a legacy of £550 to be paid out of my War Loan." This kind of legacy does not carry interest from the date of death, but it is not liable to ademption if the fund out of which it is payable does not exist; in such a case it is payable in the same way as a general legacy out of the general estate. A demonstrative legacy does not abate with general legacies unless the fund out of which it is payable is exhausted.

With regard to interest on legacies, unless there is a time fixed for payment of a legacy it does not begin to carry interest until one year from the date of death, that being the period allowed by law to a personal representative to carry out the work of administration. Where a legacy is contingent, interest begins to run from the happening of the

[1] *Re Wheeler ; Jameson* v. *Cotter*, [1929] 2 K.B. 81.
[2] *Re Newman ; Slater* v. *Newman*, [1930] 2 Ch. 409.

contingency, and if a time for payment is mentioned interest runs from that time. Where, however, a legacy is given in satisfaction of a debt it carries interest from the date of the testator's death. A legacy charged on land also carries interest from the date of death so also does a legacy to a child or an infant person to whom the testator stands in *loco parentis*. The reason, in the case of a child or other infant person to whom the testator stands in *loco parentis*, for the legacy carrying interest is said to be that it must be considered the testator meant the legacy to be for the maintenance of such child or infant.

Conversion of Wasting Property

When an estate comprises property of a wasting or reversionary nature it may be subject to the rule known as the rule in *Howe* v. *Earl Dartmouth*.[1] This rule is as follows—

> Where a testator indicates an intention that the residue of his personal estate shall be enjoyed by persons in succession it is the duty of the executor, in the absence of evidence of a contrary intention on the part of the testator, to convert so much of the estate as is of a wasting or perishable nature, or otherwise consists of securities not authorised for the investment of trust funds, and so much of the estate as is of a reversionary or expectant nature, into authorised investments."

Numerous cases exist in which the Court has deduced from the terms of a will an indication of a contrary intention to the rule being applied. The most usual expression in a will to this effect is that

[1] (1802), 7 Ves. 137.

the rents and profits of the property shall from the time of the testator's death go to the same persons and in like manner as the income of the proceeds of the sale would have done if the sale and conversion had been actually made.

Where the rule applies, until the conversion has been carried out, the tenant for life is not entitled to the whole of the income of the wasting property or unauthorised security but to interest, now calculated at the rate of 4 per cent per annum on the value of the security as at the date of the testator's death.

A corollary rule to this was established in 1883 when it was decided that in the case of reversionary property the apportionment between the tenant for life and the remaindermen should be effected by ascertaining what sum put out at the time of the testator's death calculating the interest with yearly rests (allowing income tax) would with the accumulations of interest, have produced the amount which is received when the reversion falls in. This sum will represent the capital and the residue will represent the income.[1]

Among the cases where the rule in *Howe* v. *Dartmouth* does not apply are the following. It does not apply in the case of an intestacy because the trust for sale imposed by Section 33 of the Administration of Estates Act, 1925, provides—

> (5) The income (including the net rents and profits of real estate and chattels real, after payment of rates, taxes, rent, cost of repairs, insurance, and other outgoings properly

[1] *Re Chesterfield's Trusts* (1883), 24 Ch. 643.

attributable to income) of so much of the real and personal estate of the deceased . . . may, however such estate is invested, as from the death of the deceased, be treated and applied as income, and for that purpose any necessary apportionment may be made between the tenant for life and the remainderman.

The rule is not applicable in the case of leasehold property as subsection 28 (2) of the Law of Property Act, 1925, has the effect that where leaseholds have been held on trust for sale under a power of postponement the rule is no longer applicable, so that the tenant for life becomes entitled to the full income and not to 4 per cent only on its value as at the date of death.[1] The subsection referred to is as follows—

Subject to any direction to the contrary in the disposition on trust for sale or in the settlement of the proceeds of sale, the net rents and profits of the land until sale, after keeping down costs of repairs and insurance and other outgoings shall be paid or applied, except so far as any part thereof may be liable to be set aside as capital money under the Settled Land Act, 1925, in like manner as the income of investments representing the purchase money would be payable if a sale had been made and the proceeds had been duly invested.

It has been held that where residuary personalty is given by will to trustees on trust for conversion with power of postponement the rule in *Howe* v. *Earl Dartmouth* still applies to property other than leaseholds notwithstanding the above subsection, as that section is not made applicable to pure personalty by Section 39 (1) (ii) of the Administration of Estates Act, 1925, which deals with the

[1] *Re Brooker ; Brooker* v. *Brooker*, [1926] W.N. 93.

powers of a personal representative.[1] This is the subsection in question—

> (ii) All the powers, discretions, and duties conferred or imposed by law on trustees holding land upon an effectual trust for sale (including power to overreach equitable interests and powers as if the same affected the proceeds of sale).

It must be confessed it is difficult to see the exact application of this subsection as it seems to clearly give *all* the powers, discretions, and duties of a trustee for sale to a personal representative.

The rule never applies in the case of a settlement made by deed, nor does it apply to realty.

The rule does not apply to "specific" property given to persons in succession. Nor does it apply when there is a trust for sale on the death of the tenant for life, nor where there is a direction or authority to retain any existing investment, nor in any case where a sale is directed to be made with the consent of all the beneficiaries.

The rule has no application when apportioning income of a testator's estate on his death. From whatever source the testator's income was derived, the proportion of that income down to the date of death belongs to the estate as capital.

A further rule in connection with the administration of estates is that known as the rule in *Allhusen* v. *Whittell*.[2] This rule is that the amount of the testator's capital at his death, plus the income of the first year succeeding his death, and,

[1] *Re Trollope's Will Trusts*, [1927] 1 Ch. 596.
[2] L.R. (1867), 4 Eq. 295.

secondly, the sums required to pay the debts, legacies and similar deductions are to be ascertained. The deductions are then considered to be payable in the proportion which the first year's income bears to the total of capital and income, thus—

Capital at death	£10,000	Amount of debts, etc.	£600
First year's income	500		
	£10,500		

Here the proportion of the debts payable out of the first year's income would be $\frac{600}{10500}$ of £500 = £29 approximately, so that for the first year the tenant for life would only be entitled to the balance of £471 of that year's income.

The reason for this rule was stated to be that "it is clear the tenant for life ought not to have the income arising from what is wanted for the payment of debts because that never becomes residue in any way whatever."

In a more recent case it was decided that the income for the purpose of such calculation should be the net income, i.e. the income after deducting income tax.[1]

This rule, however, is not rigidly adhered to, and indeed it has been decided that it need not be slavishly followed in every case where residue is settled, and that it should not be applied in a case where large sums have been expended in clearing the estate at intervals considerably prior to the end of the first year.[2]

[1] *Oldham* v. *Myles*, [1927] W.N. 113.
[2] *Re McEuen ; McEuen* v. *Phelps* (1914), 83 L.J. Ch. 66.

The rule must also be considered in the light of the new order for payment of debts already alluded to. For instance, if a testator gave his residuary estate to A, B, and C as tenants in common or in equal shares, and either of these three died in the testator's lifetime there would be an intestacy, and, in the absence of any contrary direction in the will, the share in respect of which such intestacy occurred would be the first property liable to payment of debts, and there might very likely then be no occasion to resort to any other part of the estate.

It will be found that in general practice, however, this rule is seldom regarded except in the case of very large estates. It is often considered to be too involved to commend itself for general adaptation.

Reversionary Property

When reversionary property falls into possession the method of apportioning the amount received between capital and income has been suggested by the case of *Re Chesterfield's Trusts*.[1] It will be understood that by "reversionary" property the reference is to cases where a testator's interest was vested but there was an outstanding interest in the property having priority over this vested interest. For instance, there may be a will under which A receives the income for life, and on A's death the property is to go to B absolutely. In this case, if B survives the testator his interest will "vest" immediately, though he will receive nothing during

[1] (1883), 24 Ch. D. 643.

A's lifetime. If B should predecease A, his reversionary interest will form part of his estate, and if B has settled his estate on persons in succession, it is when A dies and the reversion "falls in" that the calculation is to be made. What proportion should the life tenant under B's will receive? It may be that for some years this reversionary interest has yielded nothing, and on its becoming payable it was decided in *Re Chesterfield* that the following principle must be adopted. Find the sum which at B's death would, if put out at interest then and calculated with yearly rests, less income tax, produce the sum actually received. The sum thus ascertained must be regarded as capital, and the balance of the sum actually received must be regarded as income and paid to the tenant for life.

Adjustment of "Hotchpot"

When it is found that any sums or allowances have to be brought into hotchpot on the division of the trust funds the sums must first be brought in as part of the assets of the testator's estate.

Thus, assuming we have an estate of the capital value of £7,000 to be divided among four, one of whom has had an advance of £2,000 to be accounted for and a second an advance of £1,000 to be accounted for, the notional fund for division will be—

Value of estate	£7,000
Amounts to be brought into account . . .	3,000
	£10,000

The actual sum for division will then be accounted for in this way—

	£	£
A's share of £10,000	2,500	
Less advance	2,000	
		500
B's share of £10,000	2,500	
Less advance	1,000	
		1,500
C's share of £10,000		2,500
D's share of £10,000		2,500
		£7,000

In cases where the residuary estate cannot be immediately divided, and in which sums have so to be accounted for, two methods of adjusting the income on division have been formulated by the Courts, and there are several cases dealing therewith which should be consulted in case of difficulty.[1]

Assuming an estate of £7,000 as before with two sums of £2,000 and £1,000 to be accounted for and that the income on the £7,000 is £300.

Under the first rule, interest at 4 per cent would be charged on the £2,000 and £1,000 which would make the total income £420, and this would be thus apportioned—

	£
A gets £105, less interest on his £2,000 (£180)	25
B gets £105, less interest on his £1,000 (£40)	65
C gets	105
D gets	105
	£300

Under the second rule, the principle is to take the

[1] *Re Rees ; Rees* v. *George* (1881), 17 Ch. D. 701; *Re Poyser*, [1908] 1 Ch. 828; *Re Craven*, [1914] 1 Ch. 358; *Re Forster-Brown*, [1914] Ch. 564; *Re Tod*, [1916] 1 Ch. 567; *Re Hargreaves* (1903) 88 L.T. 100; *Re Mansel, Smith* v. *Mansel*, [1930] 1 Ch. 352.

£7,000 plus the advances, £3,000, making a total of £10,000, and to apportion the £300 on this total, thus—

	£	s.	d.
A gets $\frac{1}{14}$	21	8	6
B gets $\frac{8}{14}$	64	5	8
C gets $\frac{5}{14}$	107	2	11
D gets $\frac{5}{14}$	107	2	11
	£300	–	–

Although the second method has been generally disregarded, yet in the latest recorded case Farwell, J. decided in its favour unless in any case it can be distinguished on one of two grounds; first, that the testator did not contemplate an immediate division; or, secondly, that the nature of the estate forbids a reasonable and fair valuation at the death, and in the case then being considered (*re Mansel*) he held that the rule was not excluded on either ground.

In connection with the question of hotchpot it has also been decided that where any of the sums to be accounted for have been paid or advanced more than three years before the testator's death, and have thereby escaped liability for estate duty, the benefit of this freedom from duty should be retained by the person to whom the advance was made, and that such person should, therefore, only be charged with the proportion of estate duty attributable to the sum actually received by him on the final division.[1] Therefore assuming an estate of £3,000 has to be divided, and one of two

[1] *Re Tollemache; Forbes* v. *Public Trustee*, [1930] W.N. 138.

beneficiaries to whom the estate has been bequeathed has to account for an advance of £1,000, the estate duty being chargeable only on £3,000 at 5 per cent (£150) the £3,000 would be divided in this way—

			£	s.	d.
Paid duty			150	–	–
A one half of £4,000 (less duty on £2,000)			1,900	–	–
B one half of £4,000		£2,000			
Less advance	£1,000				
Duty on £1,000	50				
		1,050			
			950	–	–
			£3,000	–	–

Losses on Investments

It sometimes happens that an investment may yield no income for some considerable time, and is only realisable at a loss and in such circumstances the question arises, who shall bear the loss? Is the tenant for life in such a case to be deprived of all income in cases where the full capital is irrecoverable?

There are two principal cases governing this point. In the first[1] it was said: "As between lifeowner and remainderman the principle is rateable equality in the incidence of the loss," and in the second[2] "The true principle in all these cases is that neither the tenant for life nor the remainderman is to gain an advantage over the other, neither is to suffer more damage in proportion to his estate and interest than the other suffers. The

[1] *Re Atkinson*, [1904] 2 Ch. 160.
[2] *Cox* v. *Cox* (1869), L.R. 8 Eq. 343.

two must share the loss in the same way as they would have shared it had it occurred when they first became entitled in possession to the fund."

The following example explains the principle of the first case—

Suppose a mortgage for £6,500 only realises £5,500, and that at the time of realisation there are two years' interest in arrear at 5 per cent, i.e. £650. In this case the £5,500 realised would be apportionable in the proportions of £6,500 and £650, thus—

	£
Tenant for life ($\frac{1}{11}$th) = ...	500
Remainderman ($\frac{10}{11}$ths) = ...	5,000
	£5,500

And in a third case [1] it was held that where in such a case the collector of a sum on account of a mortgage believed to be insufficiently secured, should at once distribute instalments collected, on the same basis.

The method suggested by the second case is that a calculation should be made by taking a fixed unit (say £100) on account of capital plus interest at a rate and for a period depending on the circumstances of the case, and then to apportion the loss in the proportions of the respective amounts of capital and interest thus arrived at.

To illustrate let us suppose the principal sum due to be £3,000, and there are 5 years interest due at 4 per cent and only £2,500 is recovered. In this

[1] *Re Aucketill's Estate* (1881), 27 L.R. Ir. 331.

case we should divide the £2,500 in the proportions of £100 and £20—

	£	s.	d.
Income ($\frac{20}{120}$ or $\frac{1}{6}$ of £2,500) =	416	13	4
Capital ($\frac{100}{120}$ or $\frac{5}{6}$ of £2,500 =	2,083	6	8
	£2,500	–	–

Apportionments

Prior to the Apportionment Act of 1870 a curious position prevailed, as under the common law, rents, annuities (except for the maintenance of infants and of married women separated from their husbands), dividends of companies and salaries were not apportionable in respect of time, but interest on money lent accrued daily. This is thus referred to in the Preamble to the Act—

> Whereas rents and some other periodical payments are not at common law apportionable (like interest on money lent) in respect of time and for remedy of some of the mischiefs and inconveniences thereby arising divers statutes have been passed.

The Act then provides that—

> From and after the passing of this Act, all rents, annuities, dividends and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day and shall accordingly be apportionable in respect of time accordingly.

The Act then provides that the apportioned part shall be payable or recoverable when the entire payment shall become due and payable.

The word "annuities" includes salaries and pensions.

The Act further provides that—

> The word "dividends" includes (besides dividends strictly so called) all dividends made by the name of dividend, bonus, or otherwise, out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at fixed times, or otherwise; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increments during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made, but the said word "dividend" does not include payments in the nature of a return or reimbursement of capital.

The question of the apportionment of dividends does not occur immediately on the death of a testator for the purposes of the Inland Revenue Account for Estate Duty purposes because the prices of stocks which have to be carried into that account generally cover the accruing dividend. They do in all cases where the stock is not quoted *ex dividend*, and then the whole of the dividend should be carried in as an addition to the estate as a purchaser of a stock *ex dividend* is not entitled to the dividend.

It frequently happens on the death of a tenant for life that the trustees and the tenant for life are not each represented by the same solicitor, and there have, in such cases, to be communications on both sides in order to ascertain the value of the estates which have to be aggregated. In cases where there are stocks it should be seen whether any of the stocks are carried in at an *ex dividend* price by the trustees as it is only in respect of these that any proportion of dividend to date of

death would have to be accounted for in the account of the tenant for life's estate.

When apportioning any item the apportionment should be made in relation to the time for which the item accrued, e.g. if income of £40 is received for a quarter ending Christmas in any year and an apportionment is desired, say, to the 1st November, the proper method is to take $\frac{33}{87}$ of £40 and not $\frac{33}{365}$ of £160. This would make a great difference if the sum to be apportioned is a large amount, and this is accounted for by the fact that the first half of the year to the 30th June comprises 181 days only, as against the second half to the 31st of December, which comprises 184 days.

As the law takes no notice of a fraction of a day a testator's estate is entitled to the income for the day on which the death took place.

For the purposes of apportionment, all dividends should be placed to a suspense account, and in cases where directions have previously been given for payment to the tenant for life's account these should be cancelled and instructions given to the bank to open a suspense account in the names of the trustees (see Form No. 3 in Appendix).

The dividends thus received could then be set out as shown on page 197.

With regard to apportionments on the death of a tenant for life in the case of stocks the position is different from that on the death of a testator, for in the former case there seems to be no ruling that the tenant for life's estate is absolutely entitled to a share of accruing dividends in all cases, and

						Capital to 1/11/..	Income
.933 o.	Half-year's div. on £700 4% Stock of G.W.R. to 31st Dec., 1929 . . . *Less* tax	£ *s.* *d.* 14 – – 3 10 –	£ *s.* *d.* 10 10 –	1930 Feb.	G.W.R. div. *per contra* (134 days and 54 days) . .	£ *s.* *d.* 7 9 8	£ *s.* *d.* 3 – 4

where stocks are sold before the next dividend after the death of the tenant for life has been received the estate appears to have no legal claim for any share of the purchase money in respect of the proportion of dividend to the date of death. Thus in a case where stock has been sold *cum dividend* it was held that Sections 3 and 4 of the Apportionment Act, 1870, only applied to a dividend actually received by the trustees.[1] The learned judge said "What the trustee has received is the purchase money of the stock sold *cum dividend.* That purchase money was augmented no doubt by the dividend prospect, but still the sum by which it was increased is not the actual dividend. It seems to me, therefore, that these sections do not apply directly."

This may work out very hardly in some cases, and it is suggested that where practicable an apportionment should be made, or, if possible, the sale of the stock suspended until the dividend has been actually received.

A dividend already declared but payable after the date of a purchase by trustees must always be regarded as capital.

It is the practice of some companies to make payments of interim dividends on stocks and shares. In any case, therefore, where a dividend is stated to be a "Final" dividend it should be ascertained what interim dividends have been paid as these must be taken into account in apportioning the income.

[1] *Bulkeley* v. *Stephens,* [1896] 2 Ch. 241.

Death Duties

Before distributing a trust fund the trustees should always ascertain that there is no outstanding claim for death duties. They should also be careful to see that the duties are debited to the proper persons. The duties which may be payable are Estate Duty and Legacy Duty or Succession Duty.

In the case of all pecuniary or specific legacies the will must be consulted to ascertain if these or any of them are given free of duty.

Estate duty is of a different species from legacy or succession duty. It is not a charge on property as it is received by different persons and varying according to the amount received by each individual or at a percentage according to the degree of relationship of the recipient; it is rather a charge on property which a deceased person ceases to enjoy and which property is said to "pass" on his death. The rate of duty graduates according to the total value of the property which thus "passes." Except where the total value of the property over which the deceased had entire control does not exceed the net value of £1,000 all property passing is "aggregated" for the purposes of ascertaining the rate of duty. This question of aggregation sometimes imposes hardship. For instance, a man may have but £2,000 in his own right, and in the ordinary course this would pay duty at 3 per cent, i.e. £60, but he may have been receiving the income on a sum of, say, £100,000 during his life and which latter sum on his death might pass to persons outside his own family. In

such a case his own £2,000 would be aggregable with the £100,000, and have to pay estate duty at the appropriate rate of £102,000, which is now 20 per cent, so that on the small private estate of £2,000 a sum of £400 would be payable for estate duty, and in addition, if the persons taking the £2,000 were not the husband or wife or the lineal issue or the parent of the deceased, the £2,000, less the £400, would be liable to legacy duty.

It will be seen, therefore, that estate duty is not only payable on property which is owned by the deceased absolutely, but on property the income of which he enjoyed or out of which any annuity may have been received by him. In such a case the duty is payable out of what has been called "a notional slice" of the property. Thus, if property valued at £100,000 and yielding an income of £5,000 was liable to pay an annuity of £1,000 to the deceased, on the death, as £1,000 is the 5th part of the total income, estate duty would be charged on one-fifth of the total value of the property, and this would be a charge on that property. If, however, the deceased had purchased an annuity which would cease on his death no duty is chargeable as there is no property out of which it would be payable.

A personal representative is liable for the payment of estate duty on personal property which passes to him as executor or administrator, and this is payable out of the residuary estate. This duty bears interest at 4 per cent from the date of the death.

Property which passes in exercise of a general power of appointment however, has to bear its own duty.[1]

Real property, however, has to bear its own estate duty. This is presumably because at the time of the creation of estate duty (in 1894) real estate did not pass to the personal representative but direct to the devisee or heir-at-law. It was not until the Land Transfer Act of 1897 that real estate first devolved on a personal representative, and no alteration was then made in the case of the duty, and nothing in the Law of Property Act, 1925, or in the Administration of Estates Act, 1925, has altered the incidence of real property to estate duty.

Although this latter fact is stated on several occasions in those Acts, efforts were made by the Inland Revenue to make real property which comprised undivided shares liable in the same way as personal property. The argument used was that as undivided shares became subject to a trust for sale such shares were notionally converted into personalty.

Estate duty on real property does not begin to carry interest until one year from the death, and may be paid by eight equal yearly or sixteen half-yearly instalments. Had the Revenue succeeded in their endeavours to make undivided shares in real property liable in the same way as personal property, these advantages would have been lost and the duty on undivided shares in real property would have been payable at once, and carry interest

[1] *O'Grady* v. *Wilmot*, [1916] 2 A.C. 231.

at 4 per cent from the date of the death until payment.

The fact that real property is liable for its own estate duty is also important because anyone deriving a benefit, such as an annuity or a capital sum, charged on such property by the will of the testator must, in the absence of any directions to the contrary, bear a rateable proportion of such duty. In the case of a capital sum it would be charged on its relative proportion of the value of the property at the time of the death. Thus, if an estate of £10,000 paid duty of £500 a capital sum of £1,000 would have to bear £50 which would be deducted before payment over. In the case of an annuity of £100 charged on that property, the adjustment would be made in this way: Suppose the estate of £10,000 yielded an annual income of £400 it would be obvious that one-fourth of the property would be needed to pay the annuity of £100, and therefore £125 of the duty is apportionable to the annuity, and the annuitant should, therefore, be debited with interest at 4 per cent on the £125, so that the net amount of annuity payable would be £100, minus £5 = £95. If the will should have given the annuity "free from deduction" or if it was a bequest of a "clear" annual annuity, or words to that effect, the annuity would be payable in full without any deduction in respect of contribution towards the estate duty.

Where settled property pays duty on the death of one of the spouses it does not again become payable on the death of the other spouse.

Brothers and sisters of the deceased and their descendants are liable to legacy or succession duty at the rate of 5 per cent. All more remote descendants pay at the rate of 10 per cent. Personal representatives must see these duties are paid, and charge it to the legatees unless the gift is in any case free of duty, when the duty will be paid out of the residuary estate.

A specific legacy under £20 in value is free of duty, but if it forms part of the benefit received by the legatee, e.g. if it be given jointly with a pecuniary legacy which together bring the total over £20, then legacy duty will be charged on the value of the total gift.

Where there was a devise of land "free of all duties" to A for life with remainders over in favour of other persons and a gift of the residue to B after payment of debts, funeral and testamentary expenses legacy, succession and other duties, this was held to mean the duties immediately payable on the testator's death and not those which might become payable on the death of the tenant for life.[1]

This is a very useful and convenient decision for otherwise it would have meant the putting aside of an indefinite sum to meet any such prospective duties. It would have been difficult to estimate such a sum as it would depend on the value of the settled property on the death of the tenant for life and whether or no he left other estate to be aggregated therewith.

[1] *Re Trimble ; Wilson* v. *Turton*, [1931] 1 Ch. 369.

APPENDIX A

IMPROVEMENTS authorised by Section 83 of the Settled Land Act, 1925, and set out in the Third Schedule to that Act.

PART I

Improvements, the costs of which are *not* liable to be repaid by instalments—

(i) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses;

(ii) Bridges;

(iii) Irrigation; warping;

(iv) Drains, pipes, and machinery for supply and distribution of sewage as manure;

(v) Embanking, or weiring from a river or lake, or from the sea, or a tidal water;

(vi) Groynes; sea walls; defences against water;

(vii) Inclosing; straightening of fences; re-division of fields;

(viii) Reclamation; dry warping;

(ix) Farm roads; private roads; roads or streets in villages or towns;

(x) Clearing; trenching; planting;

(xi) Cottages for labourers, farm-servants, and artisans, employed on the settled land or not;

(xii) Farmhouses, offices, and outbuildings, and other buildings for farm purposes;

(xiii) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise;

(xiv) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption;

(xv) Tramways; railways; canals; docks;

(xvi) Jetties, piers, and landing places on rivers, lakes, the sea or tidal waters, for facilitating transport of persons and of

agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes;

(xvii) Markets and market-places;

(xviii) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land;

(xix) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connection with any of the objects aforesaid;

(xx) Trial pits for mines, and other preliminary works necessary or proper in connection with development of mines;

(xxi) Reconstruction, enlargement, or improvement of any of those works;

(xxii) The provision of small dwellings, either by means of building new buildings or by means of the reconstruction, enlargement, or improvement of existing buildings, if that provision of small dwellings is, in the opinion of the Court, not injurious to the settled land or is agreed to by the tenant for life and the trustees of the settlement;

(xxiii) Additions to or alterations in buildings reasonably necessary or proper to enable the same to be let;

(xxiv) Erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof;

(xxv) The rebuilding of the principal mansion house on the settled land;

Provided that the sum to be applied under this head shall not exceed one-half of the annual rental of the settled land.

PART II

Improvements, the costs of which the trustees of the settlement or the Court *may* require to be replaced by instalments—

(i) Residential houses for land or mineral agents, managers, clerks, bailiffs, woodmen, gamekeepers, and other persons employed on the settled land, or in connection with the management or development thereof;

(ii) Any offices, workshops and other buildings of a permanent nature required in connection with the management or development of the settled land or any part thereof;

(iii) The erection and building of dwelling-houses, shops, buildings for religious, educational, literary, scientific, or public purposes, market places, market houses, places of amusement and entertainment, gasworks, electric light or power works, or any other works necessary or proper in connection with the development of the settled land, or any part thereof as a building estate;

(iv) Restoration or reconstruction of buildings damaged or destroyed by dry rot;

(v) Structural additions to or alterations in buildings reasonably required, whether the buildings are intended to be let or not, or are already let;

(vi) Boring for water and other preliminary works in connection therewith.

PART III

Improvements, the costs of which the trustees of the settlement or the Court *must* require to be replaced by instalments—

(i) Heating, hydraulic or electric power apparatus for buildings, and engines, pumps, lifts, rams, boilers, flues, and other works required or used in connection therewith;

(ii) Engine houses, engines, gasometers, dynamos, accumulators, cables, pipes, wiring, switchboards, plant, and other works required for the installation of electric, gas or other artificial light, in connection with any principal mansion house, or other house or buildings; but not electric lamps, gas fittings, or decorative fittings required in any such house or building;

(iii) Steam rollers, traction engines, motor lorries and movable machinery for farming or other purposes.

15^{10} 24 pp.

APPENDIX B

INVESTMENT of Capital money arising under the Settled Land Act, 1925.

Section 73 of the Act authorises the application of capital money—

(i) In investment in Government securities, or in other securities in which the trustees of the settlement are by the settlement or by law authorised to invest trust money of the settlement, with power to vary the investment into or for any other such securities;

(ii) In discharge, purchase, or redemption of incumbrances affecting the whole estate the subject of the settlement, or of land tax, rent-charge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land, or of any charge in respect of an improvement created on a holding under the Agricultural Holdings Act, 1923, or any similar previous enactment;

(iii) In payment for any improvement authorised by this Act;

(iv) In payment as for an improvement authorised by this Act of any money expended and costs incurred by a landlord under or in pursuance of the Agricultural Holdings Act, 1923, or any similar previous enactment, or under custom or agreement or otherwise, in or about the execution of any improvement comprised in Part I or Part II of the First Schedule to the said Agricultural Holdings Act;

(v) In payment for equality of exchange of settled land;

(vi) In discharge of any fines payable in respect of the alienation of any settled land affected by manorial incidents;

(vii) In payment of the gross sum or an instalment thereof attributable to capital payable as compensation for the extinguishment of manorial incidents affecting the settled land, and for the acquisition of any mines, minerals, and other rights of the lord, or the owner of the land affected by the manorial incidents, and for the compensation of the steward;

(viii) In redemption of any compensation rent-charge created in respect of the extinguishment of manorial incidents, and affecting the settled land;

(ix) In commuting any additional rent made payable on the conversion of a perpetually renewable leasehold interest into a long term, and in satisfying any claim for compensation on such conversion by any officer, solicitor, or other agent of the lessor in respect of fees or remuneration which would have been payable by the lessee or under-lessee on any renewal;

(x) In purchase of the freehold reversion in fee of any part of the settled land, being leasehold land held for years;

(xi) In purchase of land in fee simple, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land;

(xii) In purchase either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes;

(xiii) In redemption of an improvement rent-charge, that is to say, a rent-charge (temporary or permanent) created, whether before or after the commencement of this Act, in pursuance of any Act of Parliament, with the object of paying off any money advanced for defraying the expenses of an improvement of any kind authorised by Part I of the Third Schedule to this Act;

(xiv) In the purchase, with the leave of the Court, of any leasehold interest where the immediate reversion is settled land, so as to merge the leasehold interest (unless the Court otherwise directs) in the reversion, and notwithstanding that the leasehold interest may have less than sixty years to run;

(xv) In payment of the costs and expenses of all plans, surveys, and schemes under the Town Planning Act, 1925, or any similar previous enactment, made with a view to, or in connection with the improvement or development of the settled land, or any part thereof, or the exercise of any statutory powers, and of all negotiations entered into by the tenant for life with a view to the exercise of any of the said powers, notwithstanding that such negotiations may prove abortive, and in payment of the costs and expenses of opposing any

such proposed scheme as aforesaid affecting the settled land, whether or not the scheme is made;

(xvi) In the purchase of an annuity charged under Section 4 of the Tithe Act, 1918, on the settled land or any part thereof, or in the discharge of such part of any such annuity as does not represent interest;

(xvii) In payment to a local or other authority of such sum as may be agreed in consideration of such authority taking over and becoming liable to repair a private road on the settled land or a road for the maintenance whereof a tenant for life is liable *ratione tenuræ.*

(xviii) In financing any person who may have agreed to take a lease or grant for building purposes of the settled land, or any part thereof, by making advances to him in the usual manner on the security of an equitable mortgage of his building agreement;

(xix) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge;

(xx) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions of this Act including the costs and expenses incidental to any of the matters referred to in this section;

(xxi) In any other mode authorised by the settlement with respect to money produced by the sale of the settled land.

APPENDIX C

TRUST INVESTMENTS

SECTION 1 (1) of the Trustee Act, 1925, provides—

A trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say—

(*a*) In any of the Parliamentary stocks or public funds or Government securities of the United Kingdom:

(*b*) On real or heritable securities in the United Kingdom, including the security of a charge on freehold land by way of legal mortgage and a charge under Section 33 of the Finance Act, 1896;

(*c*) In the stock of the Bank of England or the Bank of Ireland;

(*d*) In India, 7, 5½, 4½, 3½, 3, and 2½ per cent stock or in any other capital stock which may at any time be issued by the Secretary of State in Council of India under the authority of any Act of Parliament, and charged on the revenues of India, or any other securities the interest in sterling whereon is payable out of and charged on the revenues of India;

(*e*) In any securities the interest of which is for the time being guaranteed by Parliament;

(*f*) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District, or in Metropolitan Water Stock;

(*g*) In the debenture or rentcharge, or guaranteed or preference stock of any railway company in the United Kingdom incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than 3 per centum on its ordinary stock;

(*h*) In the stock of any railway or canal company in the United Kingdom whose undertaking is leased in perpetuity or for a term of not less than 200 years at a fixed rental to any such railway company as is mentioned in paragraph (*g*) of this subsection, either alone or jointly with any other railway company;

(*i*) In the debenture stock of any company owning or operating a railway in India the interest in sterling on which is paid or guaranteed by the Secretary of State in Council of India;

(*j*) In the "B" Annuities of the Eastern Bengal, the East Indian, the Scinde Punjub and Delhi, Great Indian Peninsula and Madras railways, or in any securities substituted therefor, and any like annuities which may at any time after the commencement of this Act be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway; also in deferred annuities comprised in the register of holders of annuity Class D and annuities comprised in the register of annuitants Class C of the East Indian Railway Company;

(*k*) In the stock of any company owning or operating a railway in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed;

(*l*) In the debenture or guaranteed or preference stock of any company in the United Kingdom established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than 5 per centum on its ordinary stock;

(*m*) In nominal or inscribed stock issued, or to be issued, under the authority of any Act of Parliament or Provisional Order, by the corporation of any municipal borough in the United Kingdom having, according to the returns of the last census prior to the date of investment, a population exceeding 50,000 or by any county council in the United Kingdom;

(*n*) In nominal or inscribed stock issued or to be issued by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having according to the returns of the last census prior to the date of investment a population exceeding 50,000, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners have not exceeded 80 per cent of the amount authorised by law to be levied;

(*o*) In any stocks, funds, or securities authorised under the Colonial Stock Act, 1900, or any Act extending the same, but subject to any restrictions thereby imposed;

(*p*) In any local bonds issued under the Housing (Additional) Powers Act, 1919, and mortgages of any fund or rate granted after the passing of that Act under the authority of any Act or Provisional Order by a local authority (including a county council) which is authorised to issue local bonds under that Act;

(*q*) In any stock or securities issued in respect of any loan raised by the Government of Northern Ireland:

(*r*) In any of the stocks, funds or securities for the time being authorised for the investment of cash under the control or subject to the Order of the Court;

and may also from time to time vary any such investment.

By subsection (2) of Section 1 it is provided that the London & North Eastern Railway Company, the Southern Railway Company, the London Midland & Scottish Railway Company, and the Great Western Railway Company shall each be treated as having paid the 3 per cent for the ten years before the date of investment, the date for the first two being the 1st January, 1923, and for the other two the 1st July, 1923. By the same subsection it is provided that a railway or canal company in Northern Ireland whose system is partly situate in the Irish Free State shall not be deemed a company in Northern Ireland.

Section 2 further provides that a trustee may invest in any of the securities mentioned although the same may be redeemable and the price exceeds the redemption value, but a proviso is added to the effect that, in the case of those investments mentioned under (*g*), (*i*), (*k*), (*l*), (*m*), (*o*), (*p*), and (*q*), none of these must be purchased at a price exceeding 15 per cent above par, or such other rate at which it is liable to be redeemed: nor, if any such stocks are redeemable within fifteen years of the date of purchase at a price exceeding their redemption value. By the same section a trustee is empowered to retain any redeemable stocks purchased until redemption.

APPENDIX D

DISTRIBUTION OF RESIDUARY ESTATE ON AN INTESTACY AFTER 1926

In all cases where there is a surviving husband or wife he or she has a first claim for £1,000 with interest at 5 per cent in addition to the personal chattels. (These matters are dealt with in detail on pages 130 to 132.)

Subject to this the estate is distributable—

1. If there is no issue.	The estate is held on trust for the surviving spouse for life only if there are any relatives coming within the category given in this table. If there are no such relatives the surviving spouse takes the estate absolutely.
2. If there are issue.	Half the estate is held on trust for the surviving spouse for life and, subject thereto, as to that half and as to the other half, for the issue on the statutory trusts.
3. If no surviving spouse.	All for issue on the statutory trusts.
4. If parents and no issue.	For parents in equal shares.
5. If one parent and no issue.	For such parent absolutely.

If there are no issue or parents surviving the intestate, for the following in the order named—

6. Brothers & sisters of whole blood. 7. Brothers & sisters of half blood.	On the statutory trusts for these persons and their issue, the issue taking per stirpes.
8. Grandparents.	
9. Uncles and Aunts of whole blood. 10. Uncles and Aunts of half blood.	On the statutory trusts for these persons and their issue, the issue taking per stirpes.

"Statutory trusts" means "In trust, in equal shares if more than one, for all or any of the children or child of the intestate, living at the death of the intestate, who attain the age of 21 years or marry under that age, and for all or any of the issue living at the death of the intestate who attain the age of 21 years or marry under that age, of any child of the intestate who predeceases the intestate, such issue to take through all degrees according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking."

A child of the intestate must bring into hotchpot any advancement made by the intestate on marriage or otherwise. When other than children of the intestate take, there is no such obligation to bring advances into hotchpot.

APPENDIX E

MISCELLANEOUS FORMS

1. Request for Payment of Dividends

TO

WE, the undersigned, hereby authorise and request you, until this request is revoked by us, to pay all interest and dividends from time to time becoming due on any stocks or shares of your company for the time being standing in our joint names to the
Banking Company Limited, and their receipt shall be your good and sufficient discharge for the same.

DATED this day of 19...

Name .....

Address.. .....

Name..... .....

Address..... .....

2. Request to Bank to Credit Account of Tenant for Life

TO Bank Limited.

Address.

Gentlemen,

We hereby authorise and request you, until the receipt of instructions to the contrary from us, to credit all interest and dividends received by you in respect of all stocks and shares standing in our joint names to the account of

of with you.

DATED this day of 19..

3. REQUEST GIVEN ON DEATH OF A TENANT FOR LIFE FOR CREDITING DIVIDENDS TO A SUSPENSE ACCOUNT

TO Bank Limited.

(*Address*)

WE hereby revoke the authority and request given by us to you to credit the account of of with dividends and interest on stocks and shares standing in our joint names and payment of which is received by you, and hereby authorise and request that you will, until this request is cancelled by us, credit the same to a suspense account to be opened in our joint names.

DATED this day of 19...

Name.....

Address.....

Name.....

Address.....

4. STATUTORY ADVERTISEMENT FOR CREDITORS

A. B. of etc. deceased.

Pursuant to the Trustee Act, 1925, Section 27.

NOTICE is hereby given that all persons having any claims against the estate of the above named deceased who died on the day of 19.. and Probate of whose will (or Letters of Administration to whose estate) was granted by the Probate Registry on the day of 19.. to are requested to send particulars thereof to the undersigned on behalf of the executors (or administrators) on or before the day of 19.. And that after that date the said Executors (or Administrators) will proceed to distribute the assets of the said deceased amongst the persons entitled thereto having regard only to the claims of which they shall then have received notice, and further that they will

not be in any way liable for the claims of any persons of which they shall not then have received notice.

DATED this day of 19..

C. & D.

of etc.

Solicitors for the said Executors (or Administrators).

N.B. Not less than two months' notice must be given and the advertisement must appear in the *London Gazette* and in a paper circulating in the locality in which the deceased resided.

5. STATUTORY ADVERTISEMENT (SETTLEMENT)

Pursuant to the Trustees Act, 1925, Section 27.

In the matter of the settlement dated the day of 19.. made on the marriage of A. B. of etc. and C. D. of etc.

NOTICE is hereby given that all persons having or claiming to have any claim or interest under the above mentioned settlement are hereby required to send particulars of their claim or interest to the undersigned on behalf of the trustees of the settlement on or before the day of 19.. And that after that date the said trustees will proceed to distribute the trust funds comprised in the said settlement amongst the persons entitled thereto having regard only to the claims of which they shall then have had notice, and further that the said trustees will not be in any way liable for the claim or interest of any person of which they shall not then have received notice.

DATED this day of 19...

Solicitors' names

Address

Solicitors for the said trustees.

N.B. (See note to last Form.)

6. Vesting Deed

THIS VESTING DEED is made the day of 19.. BETWEEN A. B. of etc. and C. D. of etc. (hereinafter called "the Trustees") of the one part and E.F. of etc. (hereinafter called "the tenant for life") of the other part WHEREAS—

1. Under and by virtue of a settlement dated etc. and made between etc. (or, under and by virtue of the Will of etc. dated etc. and proved etc.) the property hereinafter mentioned is vested in the tenant for life upon the trusts of the said Settlement (Will) and the Trustees are the Trustees of the Settlement (Will) for the purposes of the Settled Land Act, 1925.

2. The tenant for life has requested the trustees to execute in his favour a Vesting Deed in pursuance of the provisions of the said Act.

Now for giving effect to the requirements of the Settled Land Act, 1925, THIS DEED WITNESSETH as follows—

1. The Trustees as Trustees hereby declare that ALL THAT etc. (If the description of the property is lengthy it would be better to give it by schedule) And all other (if any) the premises capable of being vested by this Declaration and which are by any means subject to the limitations of the recited settlement shall forthwith vest in the tenant for life in fee simple (or, if both freehold and leasehold, say, as to the freehold property in fee simple and as to the leasehold property for all the estate and interest for which the same is held).

2. The tenant for life shall stand possessed of the said premises upon the trusts and subject to the provisions upon and subject to which the same ought from time to time to be held.

3. The trustees are the trustees of the settlement for the purposes of the Settled Land Act, 1925.

4. (Add any additional powers to those in the Act conferred by the settlement.)

5. The power of appointing new trustees is vested in the tenant for life during his life (If there is no such power state: "The Statutory power of appointing new trustees applies to these presents").

IN WITNESS etc.

N.B. The essentials of a Vesting Deed are—

1. A description, either specific or general, of the settled land.

2. A statement that the settled land is vested in the person to whom it is conveyed, or declared to be vested, upon the trusts from time to time affecting the same.

3. The names of the trustees of the settlement.

4. Any larger or additional powers.

5. The persons (if any) having power to appoint new trustees.

The stamp duty is 10s.

(See cases on page 31 as to errors in Vesting Deeds.)

7. Deed of Discharge

THIS DEED is made the day of 19.. BETWEEN A. B. of etc. and C. D. of etc. (hereinafter called "the Trustees") of the one part and E. F. of etc. (hereinafter called "the Estate Owner") of the other part and is SUPPLEMENTAL to a Vesting Deed dated the day of 19.. and made between the parties hereto affecting property situate and known as etc.

WHEREAS the Estate Owner is now absolutely entitled to the said property and has requested the trustees to execute the Deed of Discharge hereinafter contained which the trustees have agreed to do.

NOW THIS DEED WITNESSETH that in pursuance of the said agreement and in exercise of the authority conferred on them by Section 17 of the Settled Land Act, 1925, the trustees hereby declare that they are discharged from the trust created by the settlement referred to in the said Vesting Deed.

IN WITNESS etc.

8. DEED OF DECLARATION AS TO PRESENT TRUSTEES ON AN ALTERATION BEING MADE IN THE TRUSTEESHIP

TO ALL TO WHOM THESE PRESENTS SHALL COME WE A. B. of etc. (the Appointer) C.D. of etc. (the continuing Trustee) E. F. of etc. (the retiring Trustee) and G. H. of etc. (the new Trustee) SEND GREETING—

WHEREAS these presents are supplemental to a Vesting Deed dated the day of 19.. and made between etc. being a Vesting Deed executed in favour of X as tenant for life under the Will etc. (or under a settlement dated etc.) in respect of property known as etc.

AND WHEREAS the said E. F. has retired from the trusteeship and the said G. H. has been appointed a trustee in his place.

NOW in pursuance of Section 35 of the Settled Land Act, 1925 WE HEREBY DECLARE that the above named C. D. and G. H. are the trustees of the said will (or settlement) for all the purposes of the Settled Land Act, 1925.

IN WITNESS etc.

(NOTE. This Deed will require a 10s. stamp and must be executed by the person having power to appoint trustees and by all the trustees including the retiring trustee.)

INDEX

PAGE

ACCEPTANCE of trust, advice on . . . . . 8 *et seq.*
Accounts (see Trust Accounts)
Administrators—
Power to raise £1,000 for surviving spouse . 130
importance of doing so soon . . . 131
redeem life interest 133
powers during minority . . . . 81 *et seq.*
trust for sale in 132
Advancement of capital 111
when not applicable 111
Advertisement for creditors—
form of 217
law as to 147
Agents, appointment of (see Delegation)
Anticipation, restraint on 20–99
Appointment of trustees (see Trustees)
Apportionment of income . . . . . 194 *et seq.*
Appropriation by personal representatives . . . 135
stamp duty on 137
Assent by personal representatives—
conditions of 91
covenants implied in 91
effect of 91
endorsement of, on grant 92
essentials of 49–91
forms of 93, 94
must be in writing 91
no stamp duty on 93
Attorney, power of, given by trustees 141, 142

BANK, deposit at pending investment 98
Base fee, meaning of 20
Beneficiaries, definition of 1
must be consulted on exercise of powers . . 46
Breach of trust, impounding property in respect of . . 151
"Bridgett & Hayes," effect of, on legal estate . . . 39
Builders, advances to, on building agreement . . . 106, 210
Building leases 53

CAPITAL account . . . . . 166 *et seq.*
money, investment of 96–98
under Settled Land Act 68
who entitled to, under compound settlement . 22
Compound settlement, what is (see also under "Settlement") . 20
who are trustees of 22

PAGE
Consent to sale by trustees 47
when refused 47
Contingent interest, what is 5
Creditors, advertisement for 147, 217

DEBTS, order of payment when estate insolvent 171
solvent 172
Delegation of powers 57, 139, 141, 142
Devolution of legal estate 4, 38
Disbursements, trustees entitled to repayment of . . . 10
Discharge of trustees 159

ENTAILED interest, definition of 19
how barred 19
Equitable owner, definition of 2
power to deal with property 5
Estate duty, liability as to 199, 201
Executed trust, definition of 4
Executory trust, definition of 4
Express trust, definition of 3
Executor (see Personal Representative)

FAMILY charges—
effect of Law of Property Act 14
property conveyed subject to 23
should be mentioned in contract 23
Fire insurance—
application of money 57
trustees may insure 56
Forestry leases 53
Forms—
Deed of declaration as to present trustees . . . 221
discharge of trustees 220
request for payment of dividends to bank . . 216
requests to bankers 216, 217
statutory advertisement for creditors . . . 218
vesting assents 93, 94
vesting deed 219

GENERAL power of appointment 102
Getting in trust property . . . . . 143 *et seq.*
Grants, endorsement of assents on 92

HOTCHPOT—
application on intestacy 113
how applied . . . . . 189 *et seq.*
principles of 113

IMPLIED trust, definition of 3
Improvements under Settled Land Act—
may be paid for though before Act . . . 60

PAGE

Improvements under Settled Land Act (*contd.*)—
payable out of capital 59, 205
payable out of income 59, 207
Income—
advancement of . . . . . 115 *et seq.*
apportionment of 194
payment of, to bank 169
Infants—
appointment of trustees for 123, 124
devolution of property of 83, 86
management on behalf of . . . . . 84 *et seq.*
purchase from before 1926 83
tenant for life 83
transitional provisions in respect of property of . . 83
Intestacy—
devolution of property on 88
management, powers of 90, 185
order of distribution of property 171
provision of first £1,000 . . . . . 130, 131
redemption of life interest 133
trust for sale on 132
Investments—
capital under Settled Land Act . . . 208 *et seq.*
discretion in respect of 97, 98
on mortgage by trustees 104, 106
trust investments . . . . . 211 *et seq.*

JOINT tenancy, how created 74
survivorship in respect of 4
trustees hold on 4

LEASEHOLDS—
Indemnity of trustees in respect of . . . 156
liability of life tenant in respect of . . . 64
licence for assignment of 122
Legacies—
demonstrative 180
general 180
interest thereon 182
specific 180
Life interest, redemption of 133
Limitation of land, meaning of 18

MAINTENANCE, advances for . . . . . 115 *et seq.*
Management—
delegation of . . . . . 139 *et seq.*
powers of . . . . . 43 *et seq.*
who entitled to 27, 28, 46
Mining leases 54
Miscellaneous powers of tenant for life . . . . 65 *et seq.*
Mortgage, investment on by trustees 104

PAGE

Mortgages—
by personal representatives 132
tenant for life 71–106
trustees 51, 104, 106
to raise interest of surviving spouse . . . 132
trustees must not advance on contributory or second 104
surveyor's report on investment on 105

NOTICE by tenant for life 44
to creditors 147
to trustees 9, 44

OPTION to purchase—
tenant for life may grant 65
may take lease containing 65

PAYMENT into court 148
Personal chattels, definition of 130
may now be settled 51
representatives—
appropriation, power of . . . 135
infants estates, powers over . . 83
management, powers of . . . 83
may appoint trustees . . . 121, 124
mortgages by 132
powers of, on intestacy . . . 132
trustees for Settled Land Act . . 24
Personalty settlement, form of 99, 100
Power of sale makes trustees settled land trustees . . 24
to postpone sale implied 46
when it ceases 47
Principal mansion house—
sale of 49
what is 50
Profit, trustees not entitled to 9
Protective clauses for trustees 155, 158
trusts 108
Public trustee—
appointment of trustees in place of . . . 123–124
when legal estate vested in by transitional provisions . 123, 124

REAL estate—
assents in respect of (see Assents)
bears own estate duty 201
legacy on, carries interest from death . . . 201
Releases 152
Renunciation 7
Rent-charge for payment of improvements . . . 59
Repairs, liability for 60
cases thereon . . . . . 61 *et seq.*
Resettlement, how effected 21
Resulting trust, meaning of 3

PAGE

Reversionary interest, meaning of 5
property, apportionment of 184
Rules—
Allhusen *v.* Whittell 186
Chesterfield 184
Howe *v.* Dartmouth 183

SETTLED chattels, sale of 50
land, what is 14, 17, 23
trustees—
appointment of 120
discharge of 70
indemnity clauses in favour of . 157, 158
Infants' property over . . . 83 *et seq.*
may never have legal estate . . . 29
when have powers of tenant for life . 35
who are 23
Settlement—
capital money arising under 68
compound settlement 20
trustees of 22
definition of 17
endurance of 71
how created 29
how ended 70
simple illustration of 14
trustees of (see Settled Land Trustees) .
Special personal representatives 38
powers of appointment 101, 102
Statutory owners, definition of 35
trusts, meaning of 75

TENANCY in common (see Undivided Shares)
Tenant for life—
charitable powers conferred on 66
company may be 36
definition of . . . . . 33 *et seq.*
devolution of legal estate on death of . . . 38
entitled to custody of title deeds 49
joint 34
leases by 52
mortgages by 51
notices to be given by 44
options may be granted by 65
persons having powers of . . . . . 34 *et seq.*
powers of, cannot be restricted 43
do not pass to assignee 43
may be added to 43
not assignable 43
refusal to exercise 45
purchase by 10, 12
sales by 49

PAGE

Tenant for life (*contd.*)—
shifting incumbrances 65
surrender of life interest 41
trustees have powers of, when 35
who is . . . . . 33 *et seq.*
Title deeds, tenant for life entitled to custody of . . . 49
Trust—
constructive 3
definition of 1
executed 4
executory 3
implied 3
resulting 3
simple illustration of 1
accounts—
advice on opening . . . . 160 *et seq.*
apportionments 194
audit of 165
beneficiaries not entitled to copies save at own expense 164
blending of funds, should be guarded against . 161
bonuses, whether capital or income . . 170
charges on property, liability for . . 165, 177
costs, liability for 164
death duties, apportionment of . . . 199
dividends, apportionment of 195
payment to bank . 168
estate duty, liability for 199
full entries advisable 162
hotchpot, how adjusted 189
legacy duty 199, 203
losses on investments, how apportioned . . 192
memoranda advised with accounts . . . 162
mortgage interests, income tax certificates . 169
order for payment of debts, etc . . . 171
priority payments in insolvent estates . . 176
reversionary property, apportionment of . 188
stock and cash account 166
suspension account 196
wasting property, conversion of . . . 183
corporation, definition of 44
for sale, what is 26
investments 97, 211
Trustees—
advice on acceptance of trust . . . . 7 *et seq.*
appointment of 120, 125
cannot buy trust property 10
classes of 16
deposit of trust securities by 155
discharge of 159
getting in trust property 143
inquiries to be made on appointment . . . 8

PAGE

Trustees (*contd.*)—
indemnity clauses in favour of 155, 159
investments on mortgage, rules for 104
not entitled to profit 9
notices to 8
number of 120
office of 1, 9
personal security, must not advance on . . . 104
powers for getting in estate 143, 146
releases to 152
retirement of 150
trading with trust property 10
who may appoint . . . . . 120 *et seq.*
for sale—
appointment of . . . . . 120 *et seq.*
consents to sale 47
must consult beneficiaries 46
powers of during infancy 83
tenant for life conferred on . . . 12
partition by 48

UNDIVIDED shares—
effect of devise in 81
legal estate in forbidden 73
meaning of 72
transitional provisions 75
trust for sale in respect of 75

VESTED interest, meaning of 5
Vesting declaration, implied on appointment of trustees . . 122
deeds—
by compound settlement trustees . . . 31
cases on validity of 31
discharge to trustees executing . . . 159
form of 219
necessity for 31
rules regulating, on death of tenant for life . 41
separate deeds may be for different property . 31
stamp duty on 219
trustees must execute in favour of selves . . 88
when may be dispensed with 42
who entitled to 41
who may execute 30
orders by the court 127

WASTE, what is 55
Wasting property, conversion of 183
Will, settlement created by 14, 24

MADE IN GREAT BRITAIN AT THE PITMAN PRESS, BATH